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THE NEW MEXICO LAW OF WATER RIGHTS

By

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Production Economics Research Branch
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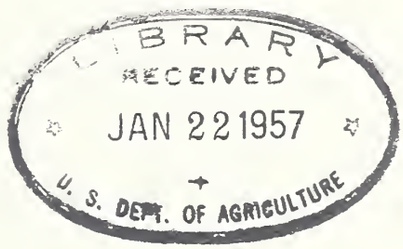

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PREFACE

This statement of the New Mexico law of water rights was prepared as part of the revision of "Selected Problems in the Law of Water Rights in the West," which was issued in 1942 as Miscellaneous Publication 418 of the United States Department of Agriculture. The completed revision will comprise an overall discussion of water rights law for the 17 Western States. This overall discussion will be followed by separate statements for each of the States concerned. If practicable, the separate for each State is to be issued in advance of publication of the complete revision.

This study reported here was prepared by the author under a cooperative arrangement with the Office of the General Counsel of the United States Department of Agriculture. The State Engineer of New Mexico cooperated with the Department by publishing the separate for his State.

TABLE OF CONTENTS

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STATE WATER POLICY

The Territory of New Mexico was established September 9, 1850. 1/ The proclamation of the President admitting New Mexico to statehood was signed January 6, 1912. 2/

The State constitution includes the following sections: 3/

> 1. All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.
>
> 2. The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.
>
> 3. Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

The New Mexico Supreme Court has held that the provision in section 3 relating to beneficial use "merely declares the basis of the right to the use of water, and in no manner prohibits the regulation of the enjoyment of that right." 4/

The supreme court has held also that the provision in section 2 relating to public ownership and appropriability of the unappropriated water of natural streams, is only declaratory of prior existing law and always had been the rule and practice under Spanish and Mexican domination of the territory embraced within the present State. 5/

1/ 9 Stat. L. 446, ch. 49.

2/ 37 Stat. L. 1723. Joint Resolution to admit the Territories of New Mexico and Arizona as States, to take effect upon proclamation of the President: 37 Stat. L. 39 (August 21, 1911).

3/ N. Mex. Const., art. XVI. The constitution was adopted January 21, 1911.

4/ Harkey v. Smith, 31 N. Mex. 521, 526-527, 247 Pac. 550 (1926).

5/ State ex rel. State Game Commission v. Red River Valley Co., 51 N. Mex. 207, 217, 182 Pac. (2d) 421 (1945-1947). It was held (at 51 N. Mex. 218) that "beneficial use" to which public waters may be put includes uses for recreation and fishing. The court held also (at 51 N. Mex. 228-229) that to say that waters belong to the public only insofar as they are subject to diversion from their natural source for irrigation, mining, and other uses would be too narrow a construction of the language in the constitution; and that waters impounded behind a dam in a public watercourse remain public waters while so impounded, subject to the right of the general public for recreation or fishery. Access to these waters, in the reported case, could be had for such purposes without trespassing upon private property.

The Territorial supreme court said it to be undoubtedly true that the diversion and distribution of water for "irrigation and other domestic purposes" in New Mexico and elsewhere in the West where irrigation is necessary, is a public purpose; 6/ and the State supreme court has held consistently to the same policy. 7/

WATERCOURSES

CHARACTERISTICS OF WATERCOURSE

Statutory Definition

The statute providing for the appropriation of natural waters flowing in "streams and watercourses" contains the following definition: 8/

> A watercourse is hereby defined to be any river, creek, arroyo, canyon, draw, or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water.

Court Decisions

The legislative concept of a watercourse, as expressed in the appropriation statute, accords with the view taken by the State supreme court in cases involving obstruction of flowing waters. Whatever uncertainty may have been caused by a contrary decision of the United States Supreme Court rendered more than a half-century ago has been removed by a recent State court decision which unqualifiedly rejects the early Supreme Court classification.

The United States Supreme Court case was decided in 1897, in error to the Territorial supreme court. 9/ The decision of the Territorial court was based upon procedural grounds only, whereas the high Court went into the merits of the controversy. Involved was the classification of a series of arroyos 4 to 18 miles in length, extending across the valley floor of the Rio Grande from the mountains to the river. The channels were unmistakable. The water came entirely from rainfall, particularly cloudbursts, in the mountains. The

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6/ Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 231, 61 Pac. 357 (1900). The decision of the Territorial court was affirmed in Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545 (1903). See this decision at 188 U. S. 555-556 concerning public use.

7/ Albuquerque v. Garcia, 17 N. Mex. 445, 450, 130 Pac. 118 (1913); Young v. Dugger, 23 N. Mex. 613, 615, 170 Pac. 61 (1918); State ex rel. Red River Valley Co. v. District Court, 39 N. Mex. 523, 527-528, 51 Pac. (2d) 239 (1935).

8/ N. Mex. Stats. 1953, Ann., sec. 75-1-1.

9/ Walker v. New Mexico & S.P.R.R., 165 U. S. 593, 600-605 (1897), affirming Walker v. New Mexico & S.P.R.R., 7 N. Mex. 282, 287-288, 34 Pac. 43 (1893). The Territorial case was decided on the constitutionality of a practice statute.

Supreme Court held that the arroyos were merely passageways for rain, rather than running streams, and hence were not natural watercourses. The origin of the water, irregularity of its appearance in the channels, and character of the channels themselves, all failed to meet the Court's concept of a watercourse.

In 1912 the New Mexico Supreme Court decided a case involving an arroyo which emerged from an opening in hills bordering the San Juan River valley and proceeded thence across the intervening bottomland to the river. 10/ The arroyo was dry most of the time, but it carried flood waters from the hills in time of rain. This the court held to be a watercourse. It was error for the trial court to find such an arroyo to be "not a permanent or natural stream or water course" because of the fact that water did not run therein during the entire year and that it carried only such waters as might be termed surface or flood waters. Quotations were given from numerous authorities on the characteristics of a natural watercourse, stressing such factors as definite and natural channel, definite banks, signs of frequent water flow in a certain direction, connection with other stream or body of water, etc. The only case that appeared to be in conflict was the WALKER case, which was not repudiated by the State court but was distinguished. A portion of the syllabus prepared by the court (at 17 N. Mex. 161) reads as follows:

> Where surface water in a hilly region or high bluffs seeks an outlet through a gorge or ravine during the rainy season and by its flow assumes a definite and natural channel, and such has always been the case so far as the memory of man runs, such accustomed channel through which the water flows possesses the attributes of a natural watercourse. The flow of the water need not be continuous, and the size of the stream is immaterial.

The New Mexico Supreme Court had for decision in 1952 a controversy which it believed "first requires a determination of the true rule in New Mexico with regard to surface waters and what constitutes a watercourse." 11/ Emphasis was laid upon the physical facts that this is a "region of mountains, hills, arroyos and heavy flash floods;" that "New Mexico is a state with an enormous number of arroyos which serve the purpose of drainage ways during the rainy seasons but are dry at other times." The WALKER decision of the United States Supreme Court had not been repudiated by the State supreme court in the JAQUEZ DITCH CO. case, but it was "adroitly distinguished" therein. Now the time had come to repudiate the WALKER holding unqualifiedly; it "is ill suited to conditions in this state and the case will not longer be followed." The rule "that to comprise a watercourse water must be carried in the channel all or a greater part of the year is not reasonable in the arid or semi-arid states which have arroyos or ditches which carry a considerable volume of water at times but are dry for most of the year." There-

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10/ Jaquez Ditch Co. v. Garcia, 17 N. Mex. 160, 162-166, 124 Pac. 891 (1912).
11/ Martinez v. Cook, 56 N. Mex. 343, 348-351, 244 Pac. (2d) 134 (1952).

fore, the principle of the WALKER decision was rejected, and that of the JAQUEZ DITCH CO. decision was reaffirmed.

Obstruction of Watercourse

Plaintiffs in MARTINEZ v. COOK contended that a lower proprietor may not, with impunity, dam a natural watercourse if the result is to cast waters back upon lands of upper proprietors to their injury. 12/ Defendants contended that, with certain exceptions, riparian rights subsist only for riparian proprietors, and that the majority of courts follow the rule that land separated from water by a highway or street the fee of which is in the public is not riparian land. The supreme court stated (at 56 N. Mex. 348) that:

> The rule contended for by the defendants applies, we believe, to the ordinary riparian rights to take water from the stream for domestic or agricultural purposes, or to operate mills, where such rights obtain. It cannot be the law in this region of mountains, hills, arroyos and heavy flash floods that because a narrow strip of land, a road or a street separates an upper and lower owner of a natural drainage way or watercourse the lower owner may with impunity build dams and back up the water on the lands of the upper owner. Many of our roads follow the course of arroyos and often cross them many times, usually on bridges or culverts. With the county or state owning the right of way and the lands of an upper owner being thus separated from the arroyo, enormous damage could be caused the lands of noncontiguous owners at the whim or caprice of the lower owner should he decide to dam the arroyo, all without right of action by the injured party if the defendants be right in their position as stated above.

WATER RIGHTS OF COMMUNITY ACEQUIAS

The "community acequia" or irrigation ditch organization 13/ -- also known as the "public acequia" 14/ -- is an ancient institution in New Mexico, many such organizations now existing having antedated the acquisition of the region by the United States. 15/ The New Mexico

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12/ Martinez v. Cook, 56 N. Mex. 343, 347-348, 244 Pac. (2d) 134 (1952).

13/ "Acequia" is used synonymously with "irrigation ditch" in the statutes and court decisions of New Mexico.

14/ In State ex rel. Black v. Aztec Ditch Co., 25 N. Mex. 590, 598, 185 Pac. 549 (1919), the court held that "Community acequias are public acequias" within the meaning of a statute originally enacted in 1852 to the effect that all rivers and streams theretofore known as public ditches or acequias were thereby established and declared to be public ditches or acequias.

15/ See "The Community Acequia: Its Origin and Development," Southwestern Historical Quarterly 31: 261-284. 1928. By Wells A. Hutchins. See also "Community Acequias or Ditches in New Mexico," State Eng., N. Mex., 8th Bien. Rept. 1926-1928; 227-237. 1928. By Wells A. Hutchins.

Supreme Court, in a decision that determined the character of water right held by the consumer under a community acequia, made the following observations as to the origin and character of the institution: 16/

> The community irrigating ditch or acequia is an institution peculiar to the native people living in that portion of the Southwest which was acquired by the United States from Mexico. It was a part of their system of agriculture and community life long before the American occupation. After the Territory of New Mexico was organized, the legislature, by the act of January 7, 1852 (Laws 1851-51 [1851-52], p. 276), provided for the government of community acequias, and doubtless incorporated into the written law of the Territory the customs theretofore governing such communities. * * *
>
> New Mexico being in the arid region, the early settlements were established along the banks of perennial rivers, or in the mountain valleys where water from springs and creeks was reasonably certain to be available for irrigation at the needed times. As a protection against Indians, settlements were made in communities, and the people built their houses and established their towns and plazas close together, and cultivated the lands in small tracts adjacent to the settlement. When a settlement was established, the people by their joint effort would construct an irrigation ditch, sufficiently large to convey water to their lands for the irrigation of crops. Each individual owned and cultivated a specific tract of land, sufficient to provide food for the needs of his family, and from the main ditch laterals were run to the various tracts of land to be watered. The distribution of the water and the repair of the ditch was in charge of a mayordomo, or officer elected by the water users under the ditch. This official would require the water users to contribute labor toward the repair of the ditch and its maintenance, and also distributed the water to the various irrigators equitably, in proportion to the land to be irrigated, as his necessities required. When a landholder under a community acequia conveyed his real estate, his right to the use of water as a member of the community passed with the real estate.

The old community acequias derived their rights from the Spanish and Mexican laws and customs. They have been protected in their enjoyment of these rights by the Territorial and State governments ever since the cession to the United States. Of course, those community ditches that began the use of water after the cession necessarily

16/ Snow v. Abalos, 18 N. Mex. 681, 691, 692-693, 140 Pac. 1044 (1914).

derive their rights from the Territorial or State laws in effect at the time the rights were initiated. Legislation with respect to the management and affairs of these organizations has been in effect from the time of the establishment of the Territorial government (see "Establishment of the appropriation doctrine," p. 8-10), and the courts have been equally zealous in safeguarding their water rights. The extant regulatory statutes are a part of the codification of State laws relating to water rights and organizations. 17/ Community acequias established and in operation at the time of the enactment of the water rights law of 1907 have been exempted from certain of its provisions. 18/

Prior to the enactment in 1895 of a statute providing that all community ditches or acequias should be considered as corporations for certain purposes, 19/ each individual water user under a community acequia was the owner of a right to take water from the source of supply, which right was independent of that of his co-consumers, regardless of the fact that the aggregate quantities of water to which the several consumers were entitled were diverted into and distributed through the same ditch. 20/ This right was appurtenant to specified land and inhered in the owner thereof, who was the appropriator of the water. The officers of the community acequia in diverting the water acted only as the agents of the individual appropriator. The act of 1895 did not change the status of the consumer's individual appropriative right.

The conclusion that rights of ownership of a community ditch are separate from the water rights pertaining to water conveyed by the ditch -- which is only a carrier -- was reaffirmed in a case decided in 1952. 21/ Plaintiffs, who owned 38.87 percent of the acreage irrigated under the ditch but only 30 percent of the shares in interest in the company, sought an injunction commanding a readjustment of shares in proportion to irrigated acres. This was refused because it was asking the court "to destroy vested property rights and create new property rights," which the court "cannot legally or constitutionally do."

The New Mexico Supreme Court has rendered a number of decisions with reference to the water rights and other affairs of community acequias, in addition to those above cited. Some of these are collected in the accompanying footnote. 22/

17/ See particularly N. Mex. Stats. 1953, Ann., secs. 75-14-1 to 75-14-61, and 75-15-1 to 75-15-10.

18/ N. Mex. Stats. 1953, Ann., secs. 75-5-2, 75-8-2, and 75-14-60. See Pueblo of Isleta v. Tondre & Pickard, 18 N. Mex. 388, 392, 395-396, 137 Pac. 86 (1913).

19/ N. Mex. Laws 1895, ch. 1; Stats. 1953, Ann., sec. 75-14-11.

20/ Snow v. Abalos, 18 N. Mex. 681, 694-696, 140 Pac. 1044 (1914). The court stated in Acequia del Llano v. Acequia de Las Joyas del Llano Frio, 25 N. Mex. 134, 141-142, 179 Pac. 235 (1919), that the status of the individual consumers under a community acequia had been fully considered in Snow v. Abalos, and that the rights and duties of such corporations had been definitely settled therein in the jurisdiction.

21/ Holmberg v. Bradford, 56 N. Mex. 401, 404-407, 244 Pac. (2d) 785 (1952).

22/ Territory v. Baca, 2 N. Mex. 183 (1882); Territory v. Tafoya, 2 N. Mex. 191 (1882); De Baca v. Pueblo of Santo Domingo, 10 N. Mex. 38, 60 Pac. 73 (1900); Leyba v. Armijo, 11 N. Mex. 437, 68 Pac. 939 (1902); Candelaria v. Vallejos, 13 N. Mex. 146, 81 Pac. 589 (1905); La Mesa Community Ditch v. Appelzoeller, 19 N. Mex. 75, 140 Pac. 1051 (1914); State ex rel. Community Ditches v. Tularosa Community Ditch, 19 N. Mex. 352, 143 Pac. 207 (1914); Halford Ditch Co. v. Independent Ditch Co., 22 N. Mex. 169, 159 Pac. 860 (1916); State ex rel. Sanchez v. Casados, 27 N. Mex. 555, 202 Pac. 987 (1921, 1922); La Luz Community Ditch Co. v. Alamogordo, 34 N. Mex. 127, 279 Pac. 72 (1929).

PUEBLO WATER RIGHTS

The attention of the New Mexico Supreme Court has been called, in at least two cases, to the "pueblo water right," which is a feature of the water law of California. As declared in the California decisions, the pueblo water right is the paramount right of an American city, as successor of a Spanish or Mexican pueblo (municipality), to the use of water naturally occurring within the old pueblo limits, for the use of the inhabitants of the city. In both cases, however, the New Mexico Supreme Court held that, under the circumstances, such pueblo water rights had not vested.

The supreme court held, with respect to the residents of the town of Tularosa, that no exclusive right on their part to the use of water could be sustained under what was known under Spanish and Mexican laws and customs as a "pueblo right." 23/ The court said (at 19 N. Mex. 378) that:

> Whether the "Plan of Pitic" applied to that portion of Mexico, of which this state was a part, is wholly immaterial, for this townsite grant was made by officers of the United States Government, under authority of an act of congress, long after New Mexico became a part of the United States, and of course would be subject to and controlled by the laws of the granting sovereign. Whatever might have been the rights of the people of this settlement, had the land been acquired from the Mexican Government by grant, or otherwise, is of no consequence. The land having been acquired from the United States, after it passed under its jurisdiction and control, the grant would carry with it only such rights and privileges as were accorded by the laws of the United States.

In a later case the trial court ruled that the "pueblo right" as defined in certain California cases obtains in New Mexico. 24/ " * * * the court held in effect that the city of Santa Fe had the right -- regardless of the prior appropriation and beneficial use by others -- to take from the Santa Fe creek from time to time all the water that may be needed at such time for the use of the inhabitants of said city and for all municipal and public uses and purposes therein."

The supreme court (at 42 N. Mex. 315-318) considered the origin and nature of the pueblo water right as declared in the California cases, and pointed out that in several such cases reference had been

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23/ State ex rel. Community Ditches v. Tularosa Community Ditch, 19 N. Mex. 352, 376, 143 Pac. 207 (1914).

24/ New Mexico Products Co. v. New Mexico Power Co., 42 N. Mex. 311, 315, 77 Pac. (2d) 634 (1937, 1938). Reference was made particularly to San Diego v. Cuyamaca Water Co., 209 Calif. 105, 287 Pac. 475 (1930), and Los Angeles Farming & Mill. Co. v. Los Angeles, 217 U. S. 217 (1910).

made to grants under Spanish and Mexican law as the source of the pueblo water right. Extensive quotations were taken from an opinion of the United States Supreme Court in a case involving the right of the city of Santa Fe to the lands upon which it is situated. 25/ With respect to the asserted "pueblo right" of Santa Fe, the New Mexico Supreme Court concluded (at 42 N. Mex. 318) that:

> It appears to have been definitely settled by this decision [UNITED STATES v. SANTA FE] that there was no grant made by the Spanish King to the Villa de Santa Fe. Without a grant, the Villa de Santa Fe had no pueblo right. We have found neither decision nor text suggesting that a mere colony of "squatters" could acquire under the Spanish law this extraordinary power over the waters of an entire nonnavigable stream known as "pueblo right," even though they were organized as a pueblo -- which is the equivalent of the English word "town" -- with a full quota of officers. The Supreme Court of the United States held, in effect, that the occupancy of the pueblo by the Spanish military and governmental authorities conferred no title on the inhabitants.

ESTABLISHMENT OF THE APPROPRIATION DOCTRINE

Legislation

The Kearny Code, promulgated by Brigadier General S. W. Kearny September 22, 1846, during the war with Mexico, provided among other things that the laws theretofore enforced concerning watercourses should continue in force, except that such regulation as was required was transferred from the governing officials of the villages to those of the counties. 26/

The first Territorial legislature of New Mexico passed an act declaring that the course of ditches or acequias already established should not be disturbed; that all rivers and streams of water theretofore known as public ditches or acequias were thereby established and declared to be such; and that all the inhabitants should have the right to construct either private or common acequias, and to take the water for them from whatever source they could, with the distinct understanding that they should pay the owner through whose lands the acequias ran a just compensation for the land used. 27/ It was provided in the same statute that no inhabitant should have the right to construct any building to the impediment of the irrigation of lands, such as mills or other property that might obstruct the course of the water, inasmuch as the irrigation of the fields should be paramount to any other uses of the water. Statutes enacted in 1851, 1852,

25/ United States v. Santa Fe, 165 U. S. 675, 676-678, 691-692, 707 (1897).
26/ Kearny Code, sec. 1.
27/ N. Mex. Laws, July 20, 1851.

and various subsequent years related to the affairs of community acequias. 28/

A statute enacted in 1887 provided for the organization of companies for the purpose of constructing and maintaining water systems and providing water for irrigation, mining, manufacturing, domestic, and other public purposes, and for the cultivation and improvement of lands. 29/ Such companies when organized were declared to be corporations with the powers and privileges usually conferred on such organizations. They were given the right to divert surplus water from any stream, lake, or spring, subject to prior vested rights, and to furnish such water to consumers.

An act passed in 1891 provided that a sworn statement describing any water control works thereafter constructed or enlarged must be filed within 90 days after the commencement of the work, and that no priority of right for any purpose should attach thereto until such record should be made; vested rights and public acequias not to be affected. 30/ The law of 1891 was superseded by two statutes enacted in 1905. 31/ These acts in turn were superseded by the comprehensive legislation of 1907 which, with amendments and additions, is in force at the present time. 32/

Court Decisions

The Territorial supreme court said that: 33/

> The law of prior appropriation existed under the Mexican republic at the time of the acquisition of New Mexico, and one of the first acts of this government was to declare that "the laws heretofore in force concerning water courses * * * shall continue in force." Code proclaimed by Brigadier General Kearney, September 22, 1846. * * * The doctrine of prior appropriation has been the settled law of this territory by legislation, custom and judicial decision. Indeed, it is no figure of speech to say that agriculture and mining life of the whole country depends upon the use of the waters for irrigation, and, if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor than those which have been acquired in the Rio Grande valley in New Mexico.

The court stated (at 9 N. Mex. 305-306) that ruins of extensive irrigation systems of a prehistoric people showed that conditions

28/ The extant statutes are cited under "Water rights of community acequias," above.
29/ N. Mex. Laws 1887, ch. 12.
30/ N. Mex. Laws 1891, p. 130.
31/ N. Mex. Laws 1905, ch. 102 and 104.
32/ N. Mex. Laws 1907, ch. 49; Stats. 1953, Ann., sec. 75-1-1 et seq.
33/ United States v. Rio Grande Dam & Irr. Co., 9 N. Mex. 292, 306-307, 51 Pac. 674 (1898). This decision was reversed by the United States Supreme Court in United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690 (1899), but not upon the point under discussion herein.

confronting the present age were those encountered in the remote past and apparently overcome; that the cultivation of the Rio Grande Valley by means of acequias diverting from the river is mentioned by the earliest of Spanish priests and explorers and established by authentic historical memorials extending back more than two centuries. The appropriation doctrine, said the court in another case, grew out of the condition of the country and the necessities of its inhabitants. 34/ The Territorial, State, and Federal courts have never ceased to emphasize the fact that the doctrine of prior appropriation is the law governing water rights in New Mexico, 35/ and that this has been so since before the acquisition of the area by the United States. 36/

REPUDIATION OF THE RIPARIAN DOCTRINE

The courts of New Mexico have declared consistently that the common-law doctrine of riparian rights is not -- and never has been -- in force in that jurisdiction. 37/

A claim of right to the use of water as a riparian owner was made by one of the parties to a controversy decided by the supreme court in 1911. 38/ The court held the claim to be untenable, pointing out that by the Mexican law in force when the United States acquired the territory, the use of water of the streams was not limited to riparian lands, but extended to other lands, subject to regulation and control by the public authorities. It was stated (at 16 N. Mex. 181-182) that:

> The doctrine of prior appropriation with application to beneficial use has definitely and wholly superseded the common law doctrine of riparian rights in many of the jurisdictions in which irrigation is necessary to the growth of crops, and among them is New Mexico. * * * Indeed, riparian ownership, as known to the common law, has never, it would seem, been recognized in New

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34/ Snow v. Abalos, 18 N. Mex. 681, 693, 140 Pac. 1044 (1914).

35/ Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 240, 61 Pac. 357 (1900), affirmed, Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 556-557 (1903); Hagerman Irr. Co. v. McMurry, 16 N. Mex. 172, 181-182, 113 Pac. 823 (1911); Murphy v. Kerr, 296 Fed. 536, 540 (D. N. Mex., 1923); Yeo v. Tweedy, 34 N. Mex. 611, 615, 286 Pac. 970 (1929, 1930); Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U. S. 92, 98 (1938); Lindsey v. McClure, 136 Fed. (2d) 65, 69 (C.C.A. 10th, 1943).

36/ State ex rel. State Game Commission v. Red River Valley Co., 51 N. Mex. 207, 217, 182 Pac. (2d) 421 (1945-1947).

37/ Trambley v. Luterman, 6 N. Mex. 15, 25, 27 Pac. 312 (1891); Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 237, 61 Pac. 357 (1900); Snow v. Abalos, 18 N. Mex. 681, 693, 140 Pac. 1044 (1914); Murphy v. Kerr, 296 Fed. 536, 540 (D. N. Mex., 1923); Yeo v. Tweedy, 34 N. Mex. 611, 615, 619-620, 286 Pac. 970 (1929, 1930); Lindsey v. McClure, 136 Fed. (2d) 65, 69 (C.C.A. 10th, 1943); State ex rel. State Game Commission v. Red River Valley Co., 51 N. Mex. 207, 218, 225, 182 Pac. (2d) 421 (1945-1947). See United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 702-706 (1899); Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 556 (1903); Carlsbad Irr. Dist. v. Ford, 46 N. Mex. 335, 341, 128 Pac. (2d) 1047 (1942). The State supreme court in Snow v. Abalos (at 18 N. Mex. 693) remarked that when the question came before the courts for adjudication, in Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, "the doctrine of prior appropriation was recognized by the courts and became the settled law of the Territory. The judicial declaration, however, did not make the law; it only recognized the law as it had been established and applied by the people, and as it had always existed from the first settlement of this portion of the country."

38/ Hagerman Irr. Co. v. McMurry, 16 N. Mex. 172, 113 Pac. 823 (1911).

> Mexico. * * * And the Mexican law, as well as the law of Indian tillers of the soil, who preceded the Spaniards here, as it may be gathered from the ruins of their irrigation systems, did but recognize the law of things as they are, declaring that such must, of necessity, be the use of the waters of streams in this arid region. * * *

APPROPRIATION OF WATER

Waters Subject to Appropriation

The State constitution provides that the unappropriated water of every natural stream, perennial or torrential, within the State belongs to the public and is subject to appropriation in accordance with the laws of the State. 39/ The water appropriation statute, as currently in force, provides that: 40/

> All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use. A watercourse is hereby defined to be any river, creek, arroyo, canyon, draw, or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water.

The supreme court has held that waters while impounded by a dam in a public stream remain public waters after the construction of the dam, as well as before, to the extent that they are subject to the right of the public for recreation or fishery, and that the owner of the dam has no right of recreation or fishery distinct from the right of the general public. 41/ Such waters are not "appropriated" until application to use has been effected.

Artificial Waters

Artificial waters are not appropriable under the statutes or constitution of New Mexico, nor in the absence of statute. 42/ Only natural waters flowing in natural watercourses are subject to appropriation, and this does not include drainage waters flowing in the ditch of a drainage district. (See "Drainage waters," p. 45.)

39/ N. Mex. Const., art. XVI, sec. 2.

40/ N. Mex. Stats. 1953, Ann., sec. 75-1-1.

41/ State ex rel. State Game Commission v. Red River Valley Co., 51 N. Mex. 207, 223-224, 228-229, 182 Pac. (2d) 421 (1945-1947). The public had access to the stored waters without trespassing upon private property.

42/ Hagerman Irr. Co. v. East Grand Plains Drainage Dist., 25 N. Mex. 649, 656-658, 187 Pac. 555 (1920).

Navigable Waters

The waters of a navigable stream may not be taken to such an extent as to substantially diminish the navigability of that stream. 43/ The Supreme Court held that while the power of changing the common-law rule of riparian proprietorship belonged in each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress, a State cannot destroy the right of the United States as the owner of contiguous lands to the continued flow of the waters so far as necessary for the beneficial uses of the government property. Second, that the power is limited by the superior power of the United States to secure the uninterrupted navigability of all navigable streams within the limits of the nation. Congress, by its legislation recognizing rights of appropriation acknowledged by local customs, laws, and court decisions, on the public domain, and by the desert land legislation, 44/ did not intend to release its control over the navigable streams of the country and to grant the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability. The Court stated that: 45/

> To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. * * *

The Court reaffirmed its position in a subsequent decision in a case originating in New Mexico. 46/

The Supreme Court's holding in the RIO GRANDE DAM & IRR. CO. case is apparently not to be taken as a denial of all right to appropriate the water of a navigable stream where the proposed appropriation does not interfere with its navigable capacity. After stating that the creation of an obstruction to navigability may be enjoined by proceedings brought under the direction of the Attorney General, the Court said (at 174 U. S. 709) that:

> Of course, when such proceedings are instituted it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the Attorney General to restrain any appropriation of

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43/ United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 703-710 (1899). This decision of the United States Supreme Court reversed the decision of the Territorial court in United States v. Rio Grande Dam & Irr. Co., 9 N. Mex. 292, 51 Pac. 674 (1898). The Territorial court had held that the Rio Grande was not navigable within the limits of the Territory of New Mexico, and therefore that an attempted appropriation of the unappropriated waters of the stream would not be actionable.

44/ 14 Stat. L. 253, sec. 9, U. S. Rev. Stats., sec. 2339; 19 Stat. L. 377 (March 3, 1877).

45/ 174 U. S. at 706.

46/ Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 554-555 (1903); affirming Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 61 Pac. 357 (1900).

> the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. * * *

Who May Appropriate Water

The appropriation statute provides procedure for the appropriation of water by "Any person, association, or corporation, public or private, the state of New Mexico, or the United States of America," thereafter intending to acquire the right of appropriation. 47/

An individual or a corporation may appropriate water for service to others. (See "Sale, rental, or distribution of water," p. 29, 30.)

Relation of Land to Appropriation of Water

Public Domain

A patent from the United States, issued after the passage of the Desert Land Act of March 3, 1877, 48/ conveys no title to water or to the use of the water. 49/ This decision was based upon holdings of the United States Supreme Court in cases arising in other States. 50/

An appropriation of water for stock raising on the public domain, by one who had stocked the range with cattle, was held to be appurtenant to the possessory right in the range land on which the water was beneficially used but not appurtenant to any specific section of land. 51/ (See "The appropriative right -- Conveyance of title," p. 24.)

Rights of the United States as Owner of the Public Domain

The effect of the Congressional act of July 26, 1866, 52/ was to recognize, so far as the United States was concerned, the validity of local customs, laws, and decisions of courts with respect to the appropriation of water on the public domain; and by this act and the

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47/ N. Mex. Stats. 1953, Ann., sec. 75-5-1. Following the reference to the United States of America is an exception referring to section 75-5-31. This is to the effect that when officials of the United States notify the State Engineer that the United States intends to utilize certain unappropriated waters, not covered by application or permits, with respect to operations under the Federal reclamation act of 1902 and amendments and supplementary legislation, then such waters shall not be subject to further appropriation for three years, during which time plans of the proposed works of the United States must be filed in order to hold the further withdrawal of the waters from appropriation.

48/ 19 Stat. L. 377.

49/ State ex rel. State Game Commission v. Red River Valley Co., 51 N. Mex. 207, 269-270, 182 Pac. (2d) 421 (1945-1947); State ex rel. Bliss v. Dority, 55 N. Mex. 12, 21-22, 225 Pac. (2d) 1007 (1950).

50/ California Oregon Power Co. v. Beaver Portland Cement Co., 295 U. S. 142, 162-165 (1935); Ickes v. Fox, 300 U. S. 82, 95-96 (1937).

51/ First State Bank of Alamogordo v. McNew, 33 N. Mex. 414, 422-429, 269 Pac. 56 (1928).

52/ 14 Stat. L. 253, sec. 9; U. S. Rev. Stats., sec. 2339.

Desert Land Act of March 3, 1877, 53/ Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. 54/ However, Congress did not thereby authorize any State to destroy the right of the United States, as the owner of public lands bordering on a stream, to the continued flow of the waters of the stream for beneficial uses of the government property, nor to confer upon any State the right to appropriate all the waters of the tributary streams uniting into a navigable watercourse and thereby destroy the navigability of that watercourse. 55/

No Title against Government by Adverse Possession

Unless the State subjects itself to the statute of limitations, no easement can be acquired against either the State or the United States by adverse possession, no matter how long continued. 56/

Rights of Way

Eminent Domain

A statute authorizes the exercise of the right of eminent domain by anyone having a water right, for the purpose of acquiring rights of way for works for the storage and conveyance of water for beneficial purposes. 57/

In sustaining the right of an individual to condemn land for a right of way for a ditch, the supreme court stated that: 58/

> The sole question presented in this case is whether the right of condemnation exists in favor of private persons for the purpose of conveying water for irrigation purposes over the land of another. * * * The case of City of Albuquerque v. Garcia et al., 17 N. M. 448, 130 Pac. 118, holding that the use of water for irrigation purposes constitutes a public use, controls the decision in this case. * * *

ALBUQUERQUE v. GARCIA was a proceeding instituted by the City of Albuquerque for the purpose of condemning a community acequia running

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53/ 19 Stat. L. 377.

54/ United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 704-706 (1899).

55/ 174 U. S. at 703-710. In deciding this navigation question, the Supreme Court reversed the decision of the Territorial supreme court in United States v. Rio Grande Dam & Irr. Co., 9 N. Mex. 292, 51 Pac. 674 (1898). See also Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 554-555 (1903).

56/ Burgett v. Calentine, 56 N. Mex. 194, 197, 242 Pac. (2d) 276 (1951, 1952). Making of improvements and use for over 60 years of water of spring on land owned by the United States and later by the State did not create an easement against either Government.

57/ N. Mex. Stats. 1953, Ann., sec. 75-1-3. Sec. 75-5-14 relates to rights and obligations incident to the enlargement of an existing canal by a person or agency other than the owner, in order to use the same in common with the former owner.

58/ Young v. Dugger, 23 N. Mex. 613, 615, 170 Pac. 61 (1918).

through and across certain streets and alleys. 59/ The court held that the owners of the acequia, whether private parties or a corporation formed under the laws relating to community acequias, had the right to condemn a right of way for a ditch, and that as irrigation was a public purpose, the city had no right, either expressed or implied under the statutes, to condemn such an acequia for another public purpose.

The court stated in 1935 that: 60/

> The state may appropriate private property under its inherent power of eminent domain by a legislative act. * * * And the question of the necessity and expediency of the taking is a legislative question. * * * Whether the use to which the property is to be put is a public use is a judicial question. * * * But the character of use here involved was long ago determined by the Supreme Court of the territory to be a public use and never departed from by this court. * * *

ALBUQUERQUE LAND & IRR. CO. v. GUTIERREZ, 61/ was cited as authority for the last statement in the quotation.

Easement of Right of Way

Termination of easement.-- The New Mexico Supreme Court has stated that: 62/

> An easement of right of way may be abandoned. But abandonment usually implies an intention to abandon and yield and give over the right. The intention may be evidenced by acts as well as words but where an act is relied on as the proof, it must unequivocally indicate such intention. * * *

Such an easement can be terminated also by destruction of its usefulness (57 N. Mex. at 211). If so terminated, the easement can never be revived; but if it is merely suspended, it may be revived.

The supreme court held in another case that disuse of a ditch by the easement holder for a period of three weeks, caused by destruction of the ditch by the landowner, was too slight under the circumstances to terminate the easement. 63/

59/ Albuquerque v. Garcia, 17 N. Mex. 445, 449-454, 130 Pac. 118 (1913). This case was distinguished in Raton v. Raton Ice Co., 26 N. Mex. 300, 307, 191 Pac. 516 (1920), where it was held that a city did have the power to condemn property already devoted to a public use provided the first public use was not obliterated or destroyed, the property to be used jointly.

60/ State ex rel. Red River Valley Co. v. District Court, 39 N. Mex. 523, 527-528, 51 Pac. (2d) 239 (1935).

61/ Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 61 Pac. 357 (1900).

62/ Posey v. Dove, 57 N. Mex. 200, 211, 257 Pac. (2d) 541 (1953).

63/ Archibeck v. Mongiello, 58 N. Mex. 749, 751, 276 Pac. (2d) 736, 738-739 (1954).

Alteration by easement owner.-- Plaintiffs in one case contended that the owner of an easement can make no change in its dimensions, location, or use which increases the burden on or damages the servient estate, unless the servient owner consents. 64/ The supreme court agreed that the overwhelming weight of authority supported the correctness of this position. "So many times has this proposition been stated and repeated and approved by the courts that we may term it hornbook law." An exception recognized in certain cases -- to the effect that if the condition of the surrounding property is later changed by lawful authority, the easement owner may make such reasonable changes in the easement itself as will render it effectual under the new conditions -- was held to be not applicable to the facts of the case at bar (57 N. Mex. at 214-216).

Alteration by servient owner.-- As a general rule, the owner of the servient estate likewise cannot in any way burden, change, or lessen the easement except with the consent of the easement holder. 65/

A statute enacted in 1933 provides that where there has been, for five years, continuous use of a ditch for purposes of irrigation "it shall be conclusively presumed as between the parties, that a grant has been made by the owners of the land, upon which such ditch is located, for the use of the same." 66/ An amendment in 1941 added a proviso to the effect that the statute shall not be construed to prevent the owner of the servient estate from making alterations, or changes in the location, of any ditch upon his land so long as such action does not interfere with the use of the ditch by the dominant owner. In ARCHIBECK v. MONGIELLO, cited in the immediately preceding paragraph, the supreme court held that the easement had vested by reason of continuous use of the ditch for irrigation purposes for more than five years immediately following enactment of the statute, and that the amendment was not controlling because the easement was established prior to its enactment (58 N. Mex. at 752-753; 276 Pac. (2d) at 738).

Method of Appropriating Water

The statute provides that one who intends to acquire the right to the beneficial use of water, before commencing any construction for such purpose, shall make application to the State Engineer for a permit to appropriate the water. 67/ If the State Engineer approves the application, he endorses his approval thereon which thereupon becomes a permit to appropriate the water. A certificate of construction is issued upon the conclusion of the works, and upon the final inspection of the project a license to appropriate water to beneficial use is issued "to the extent and under the condition of the actual application thereof to beneficial use, but in no manner extending the rights described in the permit."

64/ Posey v. Dove, 57 N. Mex. 200, 212-214, 257 Pac. (2d) 541 (1953).
65/ Archibeck v. Mongiello, 58 N. Mex. 749, 754, 276 Pac. (2d) 736, 739 (1954).
66/ N. Mex. Laws 1933, ch. 65; amended Laws 1941, ch. 155; Stats. 1953, Ann., sec. 75-14-5.
67/ N. Mex. Stats. 1953, Ann., secs. 75-5-1 to 75-5-13.

Exclusiveness of Procedure Provided by Extant Statute

The supreme court had occasion in 1923 to discuss the matter of exclusiveness of procedures for appropriating water. 68/ Attention was called to the fact that the statute of 1891 69/ had provided that a sworn statement shall be filed within 90 days after the commencement of construction, change, or enlargement of a ditch, and that no priority of right for any purpose shall attach thereto until the record is made. This was replaced by legislation enacted in 1905, 70/ which the court construed as not precluding the right to appropriate water under the general law of appropriation as recognized in the West. The statute of 1907, 71/ which with amendments and additions is now in force, "seems to provide an exclusive method for the appropriation of water after that act became effective." 72/ (Chapter 104 of Laws of 1905 had provided for the filing of notices in the office of the probate court of the county. This provision the court held to be permissive only.)

The supreme court in subsequent cases appears to have taken the position that the extant statute does provide an exclusive method of appropriating water in New Mexico. There is a statement that: 73/

> We have, however, a statute in this state regulating the acquisition, means, and manner of enjoyment of water rights which controls the whole matter, and which marks a wide departure from the doctrine above stated. It is chapter 49, Laws 1907. * * *

And there is a statement made in 1950 to the effect that the court in HARKEY v. SMITH held that the statutory manner of acquiring water rights prescribed in the irrigation law of 1907 is exclusive. 74/

Restrictions upon the Right to Appropriate Water

The statute requires the State Engineer to reject an application to appropriate water if there is no unappropriated water available for the benefit of the applicant, and provides that he may refuse to consider or approve an application if in his opinion the approval thereof would be contrary to the public interest. 75/

The State Engineer at his discretion may approve an application for a lesser amount of water than is applied for; or he may vary the periods of annual use of the water; and the permit to appropriate water shall be regarded as limited accordingly. 76/

68/ Farmers' Development Co. v. Rayado Land & Irr. Co., 28 N. Mex. 357, 368-369, 213 Pac. 202 (1923).
69/ N. Mex. Laws 1891, p. 130.
70/ N. Mex. Laws 1905, ch. 102 and 104.
71/ N. Mex. Laws 1907, ch. 49.
72/ 28 N. Mex. at 368.
73/ Harkey v. Smith, 31 N. Mex. 521, 526, 247 Pac. 550 (1926). Reference was made to this statement in Carlsbad Irr. Dist. v. Ford, 46 N. Mex. 335, 340, 128 Pac. (2d) 1047 (1942).
74/ State ex rel. Bliss v. Dority, 55 N. Mex. 12, 19, 225 Pac. (2d) 1007 (1950).
75/ N. Mex. Stats. 1953, Ann., sec. 75-5-6.
76/ N. Mex. Stats. 1953, Ann., sec. 75-5-5.

When an application to appropriate water is approved by the district court, "on appeal the appellate court will presume, in the absence of anything in the record to the contrary, that there is unappropriated water available to supply the requirements under the permit." 77/

The question of public interest was considered in a case decided in 1910. 78/ The court believed that matters of public interest went beyond questions as to whether the project was dangerous to public health or safety. The purpose of the entire statute was to obtain the greatest possible benefit to the public. It is for the public interest, said the court, that investors should be protected against making worthless investments in New Mexico, and especially that they should not be led to make them through official approval of unsound enterprises. If unappropriated water is available for only 5,000 or 6,000 acres, the public interest would not be served if a project for the irrigation of 14,000 acres with that water should receive official approval which might enable the sale of stock reasonably sure to become worthless and the sale of land that could not be irrigated, yet could be sold at the price of irrigated land. It was believed that the question of relative costs of water of two competing projects was not conclusive on the question of public interest, but that it should be taken into account. It was suggested, however, that when the cost of irrigating a small portion such as one-sixth of a project might be, say, only $5 per acre, while the cost to irrigate the other five-sixths might be $10 per acre, the increased cost to the owners of the one-sixth portion under a plan that would provide for the entire project would be no reason for refusing the owners of the five-sixths portion the privilege of irrigating their lands.

While the board of water commissioners was in existence, it was held that the board was not called upon to review the discretion of the State Engineer, but that upon appeal the board determined for itself the question as to whether the application should be approved or rejected. 79/ The hearing in the district court likewise was de novo, without review of the discretion of the State Engineer or the board.

Completion of Appropriation

Diversion and Use of Water

To constitute a valid prior appropriation of water, there must be (1) a rightful diversion and (2) an application of the water to some beneficial use. 80/ "And neither of these is sufficient without the other."

77/ Rio Puerco Irr. Co. v. Jastro, 19 N. Mex. 149, 155, 141 Pac. 874 (1914).

78/ Young & Norton v. Hinderlider, 15 N. Mex. 666, 667-668, 110 Pac. 1045 (1910).

79/ Farmers' Development Co. v. Rayado Land & Irr. Co., 18 N. Mex. 1, 9, 133 Pac. 104 (1913). Laws 1907, secs. 70 to 77, provided for a board of three water commissioners whose duty was to hear and determine appeals from the acts and decisions of the State Engineer. Their decisions were final, subject to appeal to the district court. The board was abolished by Laws 1923, ch. 28; Stats. 1953, Ann., sec. 75-2-11.

80/ Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 240, 61 Pac. 357 (1900). See also Murphy v. Kerr, 296 Fed. 536,542 (D. N. Mex., 1923); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92, 98 (1938).

Under the arid region doctrine of appropriation, the intent of the claimant must coincide with the diversion and use of the water. 81/ (Intent as a measure of the appropriative right is discussed under "The appropriative right - Measure of the right," p. 25-27.) The mere intention, however, is not sufficient to initiate a right under the arid region doctrine. 82/ There must be a "first step" to initiate the right -- a substantial act giving notice of the proposed appropriation, to be followed by diligent prosecution of the enterprise.

The principle that while diversion of the water is one of the necessary elements of an appropriation, nevertheless the appropriation is not complete until the water has been applied to the beneficial use intended, was thus phrased by the supreme court: 83/

> Diversion is one of several elements necessary to a legal appropriation of water, and while a valid appropriation may follow immediately upon the diversion of water from a stream by reason of a concurrence of the other necessary elements, it is still but an element of that appropriation, and is not equivalent to it. Water may be diverted from a stream, and still not be appropriated, and it is only when diversion is accompanied or followed by application to some beneficial purpose, that the water is appropriated so as to prevent a subsequent appropriator from acquiring a right to its use. * * *

The court held in 1945 that waters impounded in a reservoir in a public watercourse -- some of the water being intended to be used for irrigation downstream, and some held in storage for flood control -- were not appropriated simply because so impounded. 84/ It was repeated that to constitute an appropriation there must be a diversion and application to beneficial use. "These waters are not appropriated until application to use has been effected."

Doctrine of Relation

The doctrine of relation was thus expounded by the Territorial supreme court in one of its earliest decisions concerning rights to the use of water -- a decision that was rendered prior to the enactment of any statute prescribing a method for appropriating water: 85/

81/ Harkey v. Smith, 31 N. Mex. 521, 525, 247 Pac. 550 (1926); Snow v. Abalos, 18 N. Mex. 681, 694, 140 Pac. 1044 (1914).

82/ Farmers' Development Co. v. Rayado Land & Irr. Co., 28 N. Mex. 357, 369, 213 Pac. 202 (1923).

83/ Millheiser v. Long, 10 N. Mex. 99, 104, 61 Pac. 111 (1900). See State ex rel. Community Ditches v. Tularosa Community Ditch, 19 N. Mex. 352, 371, 143 Pac. 207 (1914).

84/ State ex rel. State Game Commission v. Red River Valley Co., 51 N. Mex. 207, 223-224, 182 Pac. (2d) 421 (1945-1947). The court said: "It is all yet public water until it is beneficially applied to the purposes for which its presence affords a potential use; * * *."

85/ Keeney v. Carillo, 2 N. Mex. 480, 493 (1883). See Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92, 98 (1938).

> It is true that a party may in good faith commence the necessary work to conduct to and upon his lands all, or any part of the water of a spring, stream or cienega, and continue the work with due diligence to final completion within a reasonable time, and in that case his right to the water actually appropriated by him will relate back to the time of his commencing work, and, in the meantime, and before the expiration of what would be a reasonable time, under the circumstances, he would be protected in what he could show that he intended to appropriate by his works as against any trespasser: * * *.

A much later statement by the State supreme court was that: 86/

> The doctrine of relation has been universally applied by the courts, in arid states, in the appropriation of water. Where notice is required by statute of the intention to appropriate, the right relates back to the time such notice is given, in the authorized manner; in the absence of a statute, requiring notice, or other act, the right relates back to the time when the first step was taken. This doctrine does not apply, or protect the intending appropriator however, unless he prosecutes his work of diversion with reasonable diligence.

The water appropriation statute of 1907 provided that in all cases of claims to the use of water initiated prior to the enactment of the statute, the right should relate back to the initiation of the claim, upon diligent prosecution to completion of the necessary work for the application of the water to beneficial use; and that all claims to the use of water initiated thereafter should relate back to the date of the receipt of an application therefor in the office of the Territorial Engineer, subject to compliance with the provisions of the statute and the rules and regulations established thereunder. 87/

The provision of the 1907 law concerning relation back was quoted and applied in a case in which a claim of appropriation had been initiated in October 1906, the claimant having also filed an application upon the advice of the Territorial Engineer after the passage of the 1907 statute. 88/ The supreme court held that no right had been obtained by filing an application after the passage of the statute attempting to create a right of relation back to a date prior to the passage of the statute, inasmuch as a right to the use of water under the statute could not relate back to an earlier date than the filing of the application to appropriate water. However, the statute protected claims initiated under laws in force prior to its enactment. Hence the claimed right in this case related back to the initiation

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86/ Rio Puerco Irr. Co. v. Jastro, 19 N. Mex. 149, 153, 141 Pac. 874 (1914).

87/ N. Mex. Laws 1907, ch. 49, sec. 2; Stats. 1953, Ann., sec. 75-1-2.

88/ Farmers' Development Co. v. Rayado Land & Irr. Co., 28 N. Mex. 357, 367-369, 213 Pac. 202 (1923). See the statement of specific holdings in the syllabus by the court.

of the claim, subject to diligent prosecution to completion of the necessary work for application of the water to beneficial use, regardless of any action taken with respect to the statute of 1907 by the claimant under the unauthorized advice of the Territorial Engineer.

Diligence

The supreme court has held that lack of time and means requisite to a completion of the work incident to an appropriation within a reasonable time is no excuse for failing to exercise due diligence. 89/ The court in a case decided in 1914 looked into the water statute of 1907 for possible change in the standards of diligence, and stated that: 90/

> Financial inability is not under the statute, as it was not without the statute, such a cause as will excuse lack of diligence in the prosecution of the work. * * *

The 1907 statute referred to by the court in the foregoing quotation authorized extensions of time for the completion of works equal to the time during which work was prevented by the operation of law or other causes beyond control of the permittee. This section was so amended in 1941 as to authorize greater leniency and to add prevention of work by "acts of God" to the other permissible causes of exemption. 91/

Gradual or Progressive Development

An appropriation is not necessarily measured by the area of land the appropriator irrigated in any given year. 92/ The supreme court stated that:

> The appropriator would be entitled to increase, from year to year, his use of the water, provided such enlarged use was originally claimed at the time of initiating the appropriation, and the intending appropriator proceeded with reasonable diligence to apply the water to the use intended. But where such appropriator, for illustration, only originally intended to irrigate forty acres of land, and he applied water on such land, this forty acres would be the limit of his right as such appropriator under his original appropriation. * * *

89/ Keeney v. Carillo, 2 N. Mex. 480, 493 (1883). The court stated later, in Rio Puerco Irr. Co. v. Jastro, 19 N. Mex. 149, 153, 141 Pac. 874 (1914): "The authorities all agree that the mere lack of means with which to prosecute the work is not a sufficient excuse for delay."

90/ Rio Puerco Irr. Co. v. Jastro, 19 N. Mex. 149, 155, 141 Pac. 874 (1914).

91/ N. Mex. Stats. 1953, Ann., sec. 75-5-7; originally Laws 1907, ch. 49, sec. 29. Sec. 75-5-13 authorizes extensions of time upon proper showing of due diligence or reasonable cause for delay in case of completion of construction, application of water to beneficial use, or other reasonable purpose.

92/ State ex rel. Community Ditches v. Tularosa Community Ditch, 19 N. Mex. 352, 371, 143 Pac. 207 (1914).

THE APPROPRIATIVE RIGHT

Property Characteristics

Right of Beneficial Use

The right obtainable with reference to the water of a public stream in New Mexico is the right to appropriate so much thereof as is actually used for some beneficial and legal purpose. 93/ The appropriative right -- a usufructuary right -- therefore is a right of beneficial use.

The courts recognize -- and the State constitution so provides -- that beneficial use is the basis, the measure, and the limit of the right to use of water. 94/

Property rights in water.-- The corpus of water running in a natural stream belongs to the public, or to the State in trust for the public. 95/ There is therefore no such thing as private ownership in the waters of public streams while so flowing. 96/ The appropriator acquires only the right to take from the stream a given quantity of water for a specified purpose. 97/

Water that is reduced to possession by artificial means becomes personal property, 98/ the private property of those entitled to its use. 99/

However, the supreme court held in 1945 that waters impounded behind a dam in a public stream remained public waters while so impounded, not being appropriated until applied to use. 100/ The question involved in this case was whether the public when properly authorized by the State Game Commission could participate in fishing and other recreational activities with respect to waters so impounded. It was held that the organization that had impounded these waters had no exclusive privilege in their use while they remained public and no right of recreation or fishery distinct from the right of the general public therein.

The appropriative right as property.-- The appropriative right, which is a usufructuary right, is property. 101/ It is a property right of high order. 102/

93/ Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 236-237, 61 Pac. 357 (1900). It is stated in Murphy v. Kerr, 296 Fed. 536, 541 (D. N. Mex., 1923), that the appropriative right is a usufructuary right and "is therefore the right to divert water from a natural stream by artificial means and apply the same to beneficial use."

94/ Holloway v. Evans, 55 N. Mex. 601, 607, 238 Pac. (2d) 457 (1951); N. Mex. Const., art. XVI, sec. 3. See Middle Rio Grande Water Users Assn. v. Middle Rio Grande Conservancy Dist., 57 N. Mex. 287, 299, 258 Pac. (2d) 391 (1953).

95/ Murphy v. Kerr, 296 Fed. 536, 540-541 (D. N. Mex., 1923).

96/ Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 236-237, 61 Pac. 357 (1900).

97/ Snow v. Abalos, 18 N. Mex. 681, 693, 694-695, 140 Pac. 1044 (1914).

98/ Hagerman Irr. Co. v. McMurry, 16 N. Mex. 172, 180, 113 Pac. 823 (1911).

99/ See Snow v. Abalos, 18 N. Mex. 681, 695, 140 Pac. 1044 (1914).

100/ State ex rel. State Game Commission v. Red River Valley Co., 51 N. Mex. 207, 223-229, 182 Pac. (2d) 421 (1945-1947).

101/ Murphy v. Kerr, 296 Fed. 536, 541 (D. N. Mex., 1923); New Mexico Products Co. v. New Mexico Power Co., 42 N. Mex. 311, 321, 77 Pac. (2d) 634 (1937, 1938); Lindsey v. McClure, 136 Fed. (2d) 65, 70 (C.C.A. 10th, 1943).

102/ Posey v. Dove, 57 N. Mex. 200, 210, 257 Pac. (2d) 541 (1953).

Such a right is real estate. 103/ An action to determine rights to the use of water is of the nature of a suit to quiet title to realty. 104/

The water right -- an incorporeal hereditament in the flow and use of the stream as a natural resource -- is entirely distinct from the property right in the works by which the water is diverted, stored, and carried to the land for beneficial use thereon, and each may exist without the other. 105/

The New Mexico Supreme Court has had occasion to make the foregoing distinction with respect to community acequias in several decisions relating to water rights and internal affairs of these organizations (see "Water rights of community acequias," p. 4-6). The community ditch organization is a carrier of water only; the water rights are owned by the landowners in severalty, and the ditch is owned by the members as tenants in common. An individual's ownership of water rights or irrigated acres and of shares in interest in the ditch are not necessarily in the same proportion.

Appurtenance of Land

The statute governing the appropriation of water provides that all waters appropriated for irrigation purposes, except as otherwise provided by written contract between the owner of the land and the owner of the works for storage or conveyance of the water, shall be appurtenant to specified lands owned by the holder of the right to use the water so long as the water can be beneficially used thereon, or until severance of the right from the land in the manner provided in the statute. 106/

The appurtenance of the appropriative right to the particular land on which the water is applied to beneficial use has been recognized by the courts. 107/

The supreme court has held that a right to the use of water for raising stock on the public domain, although appurtenant to the possessory right in the range land on which the water is being beneficially used, is not necessarily appurtenant to any particular part of the range and is not transferred to a homestead entryman of

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103/ Murphy v. Kerr, 296 Fed. 536, 541 (D. N. Mex. 1923); New Mexico Products Co. v. New Mexico Power Co., 42 N. Mex. 311, 321, 77 Pac. (2d) 634 (1937, 1938); Posey v. Dove, 57 N. Mex. 200, 210, 257 Pac. (2d) 541 (1953).

104/ Pecos Valley Artesian Conservancy Dist. v. Peters, 52 N. Mex. 148, 154, 193 Pac. (2d) 418 (1948).

105/ Murphy v. Kerr, 296 Fed. 536, 541 (D. N. Mex., 1923); First State Bank of Alamogordo v. McNew, 33 N. Mex. 414, 437, 269 Pac. 56 (1928). With respect to perpetual rights to receive water as easements in the ditch supplying the water, see Bolles v. Pecos Irr. Co., 23 N. Mex. 32, 41, 167 Pac. 280 (1917); Murphy v. Kerr, 296 Fed. at 546-549; and Murphy v. Kerr, 5 Fed. (2d) 908, 910-911 (C.C.A. 8th, 1925).

106/ N. Mex. Stats. 1953, Ann., sec. 75-1-2.

107/ Snow v. Abalos, 18 N. Mex. 681, 695, 140 Pac. 1044 (1914); Murphy v. Kerr, 296 Fed. 536, 541, 545 (D. N. Mex., 1923); Carlsbad Irr. Dist. v. Ford, 46 N. Mex. 335, 341, 128 Pac. (2d) 1047 (1942); Middle Rio Grande Water Users Assn. v. Middle Rio Grande Conservancy Dist., 57 N. Mex. 287, 299, 258 Pac. (2d) 391 (1953).

a part of such range land, as an appurtenance to the land, by virtue of his entry alone. 108/ See further discussion of this case under "Conveyance of title," below.

Another section of the statute states that all water used for irrigation purposes shall be considered appurtenant to the land on which it is used, and that the right to use the same upon such land shall never be severed from the land without the consent of the landowner. 109/ The same section provides for transfer of the appropriative right to other land with the consent of the landowner. (See "Changes in exercise of rights," p. 32, 33.) In such case the right is severed from the original land and becomes simultaneously appurtenant to the land to which transferred.

Conveyance of Title

The statute governing the appropriation of water provides that the transfer of title to land carries with it all rights to the use of water appurtenant thereto for irrigation purposes unless previously alienated. 110/ It is provided also that no right to appropriate water, except for storage reservoirs, for irrigation purposes shall be assigned or the ownership transferred apart from the land to which it is appurtenant, except in the manner specially provided by law. The assignment and transfer of licenses and permits is authorized, but not to become binding except upon the parties thereto until filed for record in the office of the State Engineer.

A water right for use in stock raising on the public domain was held to have been created as a substantive and independent right, in gross, incident to the possessory right of the holder with respect to range land on the public domain but not appurtenant to any specific part of the range. 111/ Consequently the transfer by parol of such possessory right, followed by delivery of possession of the lands, would carry with it the water right upon which the enjoyment of such possessory right in said land depended and as an indispensable incident to the proper use thereof. Reference was made to the fact that the courts have held that a squatter on unsurveyed public lands, awaiting survey and the filing of plats, so that he might obtain a preference right of entry, may lawfully appropriate water for the irrigation of such lands; that the right so appropriated is incident and appurtenant to the lands; and that since the right in the lands is merely possessory, not resting in grant, such right with the incident or appurtenant water right may be transferred by parol. As such parol transfers were accompanied by delivery of possession of the premises, the court could see no essential difference between the situation described in such cases and the case at bar.

108/ First State Bank of Alamogordo v. McNew, 33 N. Mex. 414, 423-429, 269 Pac. 56 (1928).
109/ N. Mex. Stats. 1953, Ann., sec. 75-5-22.
110/ N. Mex. Stats. 1953, Ann., sec. 75-5-21.
111/ First State Bank of Alamogordo v. McNew, 33 N. Mex. 414, 423-424, 427-429, 269 Pac. 56 (1928).

Elements of the Appropriative Right

Priority of Right

The constitution of New Mexico, in declaring unappropriated waters of natural streams to belong to the public and to be subject to appropriation for beneficial use, states that: "Priority of appropriation shall give the better right." 112/

The statute governing the appropriation of water provides that: "Priority in time shall give the better right." 113/ The date of priority of an appropriation made under the present statute is the date of receipt of application therefor in the office of the State Engineer, subject to compliance with the provisions of the statute and with the rules and regulations established thereunder. (Dates of priority of appropriative rights initiated prior to the passage of the present statute in 1907 related back to the initiation of the claim, provided reasonable diligence was exercised in consummating the appropriation. See "Doctrine of relation," p. 19-21.)

The rule that priority of appropriation gives priority of right as between two appropriators from the same source of supply is an essential feature of the doctrine of appropriation. 114/

Measure of the Right

Capacity of ditch discarded.--The Territorial supreme court, at the turn of the century, discarded the capacity of the ditch as measuring the limit of the appropriator's right, stating that it is the quantity of water actually applied to beneficial use that is appropriated within the meaning of the law. 115/

Intent of appropriator.--Under the arid region doctrine of appropriation, which the New Mexico Supreme Court has held to have prevailed in that jurisdiction prior to the enactment in 1907 of a comprehensive "water code", the bona fide intent of the appropriator to appropriate the water and apply the same to a beneficial use is an essential part of the appropriation. 116/ The intention, of course, must be followed up by the other acts in order to establish the validity of the claimed right. The supreme court said that: 117/

> The intention to apply to beneficial use, the diversion works, and the actual diversion of the water necessarily all precede the application of the water to the use intended, but it is

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112/ N. Mex. Const., art. XVI, sec. 2.
113/ N. Mex. Stats. 1953, Ann., sec. 75-1-2.
114/ Murphy v. Kerr, 296 Fed. 536, 542 (D. N. Mex., 1923); Lindsey v. McClure, 136 Fed. (2d) 65, 69 (C.C.A. 10th, 1943); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92, 98 (1938).
115/ Millheiser v. Long, 10 N. Mex. 99, 104, 117, 61 Pac. 111 (1900).
116/ Millheiser v. Long, 10 N. Mex. 99, 106, 61 Pac. 111 (1900); Harkey v. Smith, 31 N. Mex. 521, 525, 247 Pac. 550 (1926); Carlsbad Irr. Dist. v. Ford, 46 N. Mex. 335, 340, 128 Pac. (2d) 1047 (1942).
117/ Snow v. Abalos, 18 N. Mex. 681, 694, 140 Pac. 1044 (1914).

> the application of the water, or the intent to apply, followed with due diligence toward application and ultimate application, which gives to the appropriator the continued and continuous right to take the water. All the steps precedent to actual application are but preliminary to the same, and designed to consummate the actual application. Without such precedent steps no application could be made, but it is the application to a beneficial use which gives the continuing right to divert and utilize the water.

The intention of the appropriator under the extant water appropriation statute is implicit in the making of the application and other steps required for appropriating water under the current procedure.

Beneficial use.-- The State constitution provides that: 118/

> Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

The water appropriation statute makes a similar declaration. 119/

The constitutional provision merely declares the basis of the right to the use of water and in no manner prohibits the regulation of the enjoyment of that right. 120/ It is said by the supreme court that: "As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident, that an appropriator can only acquire a perfected right to so much water as he applies to a beneficial use." 121/

After acquiring a perfected right the appropriator is not entitled to waste water; after his requirements have been satisfied he no longer has a right to the use of the water. 122/ Beneficial use as a controlling measure of the right to appropriate water has been recognized and stressed in various decisions of the State and Federal courts. 123/

Statutory duty of water.-- The appropriation statute as amended in 1955 provides that: 124/

118/ N. Mex. Const., art. XVI, sec. 3. See Holloway v. Evans, 55 N. Mex. 601, 607, 238 Pac. (2d) 457 (1951); Middle Rio Grande Water Users Assn. v. Middle Rio Grande Conservancy Dist., 57 N. Mex. 287, 298-299, 258 Pac. (2d) 391 (1953).

119/ N. Mex. Stats. 1953, Ann., sec. 75-1-2.

120/ Harkey v. Smith, 31 N. Mex. 521, 527, 247 Pac. 550 (1926).

121/ State ex rel. Community Ditches v. Tularosa Community Ditch, 19 N. Mex. 352, 371, 143 Pac. 207 (1914).

122/ Snow v. Abalos, 18 N. Mex. 681, 694, 695, 140 Pac. 1044 (1914).

123/ In Harkey v. Smith, 31 N. Mex. 521, 531, 247 Pac. 550 (1926), the State supreme court said that "no 'dog in the manger' policy can be allowed in this state, and unless these waters can be and are beneficially used by plaintiffs, the defendants or others may use the same." See also Millheiser v. Long, 10 N. Mex. 99, 104, 106, 61 Pac. 111 (1900); Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 240-241, 61 Pac. 357 (1900); Murphy v. Kerr, 296 Fed. 536, 542 (D. N. Mex., 1923); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92, 98 (1938); Carlsbad Irr. Dist. v. Ford, 46 N. Mex. 335, 340, 128 Pac. (2d) 1047 (1942); State ex rel. State Game Commission v. Red River Valley Co., 51 N. Mex. 207, 223-224, 182 Pac. (2d) 421 (1945-1947).

124/ N. Mex. Stats. 1953, Ann., sec. 75-5-17, amended by Laws 1955, ch. 91. This section formerly provided that the allowance should not exceed one cubic foot per second for each 70 acres or its equivalent, delivered on the land.

> In the issuance of permits to appropriate water for irrigation or in the adjudication of the rights to the use of water for such purposes, the amounts allowed shall not be in excess of the limits imposed by the amount of water allowed by permit or by adjudication. The State Engineer shall permit the amount allowed to be diverted at a rate consistent with good agricultural practices and which will result in the most effective use of available water in order to prevent waste.

Period of Use of Water

Under the arid region doctrine of appropriation, an appropriation of water might be measured by time as well as by quantity. That is, an irrigator by his conduct might limit his right to certain periods of the year only, which would not prevent an appropriation of that same quantity of water by another claimant during other periods of the year. 125/ This doctrine of seasonal appropriation was not considered by the court well adapted to general agriculture. Regardless of that, the court took the position that the water appropriation statute had departed from the arid region doctrine in this particular, inasmuch as it regulated the acquisition, means, and manner of enjoyment of water rights which controlled the whole matter. Attention was called to the fact that the statute required the applicant to state in his application the quantity of water and period or periods of annual use of the water, 126/ so that now the right of the water user is measured by the permit of the State Engineer or the decree of the court.

Place of Use of Water

Water appropriated for irrigation purposes is appurtenant to the place of use. (See "Appurtenance," p. 23, 24.)

Diversion out of watershed.--A section of the water appropriation statute provides that water may be transferred from one stream or drainage into another and diverted thereform, less transmission losses determined by the State Engineer. Another section makes it unlawful to divert the waters of any public stream for use in a valley other than that of such stream, to the impairment of subsisting prior appropriations. 127/

125/ Harkey v. Smith, 31 N. Mex. 521, 525-530, 247 Pac. 550 (1926). The question arose in this case because of the fact that plaintiff had a permit for the use of 5 second-feet of water, and defendant acquired a later permit for the use of 4½ second-feet out of the 5 second-feet to which plaintiffs had obtained the prior right, defendant's permit being for the use of the water from October 15 to March 15 of each year. The basis of the defendant's claim was that as the plaintiff had not used the water during the winter for 4 years, the right to use it during that season of the year had been lost by forfeiture under the statute. The court held that the prior appropriator may use his water at any time he requires it during the year and will not forfeit his right if he makes beneficial use of the full quantity in good faith in accordance with his necessities. Hence, under this holding, there had been no loss of any part of the water right because of the fact that the water had not been used during the winter for the 4-year period.

126/ N. Mex. Stats. 1953, Ann., sec. 75-5-1.

127/ N. Mex. Stats. 1953, Ann., secs. 75-5-24 and 75-7-5, respectively.

Purpose of Use of Water

The use for which water may be appropriated must be beneficial, but the right has not been limited by either legislation or court decisions to any particular purpose or purposes of use. In fact, the supreme court has stated its inability to find authority or justification to support the claim that the "beneficial use" to which public waters might be put in New Mexico and other jurisdictions does not include uses for recreation and fishing. 128/ (Exemptions from statutory requirements in favor of stockmen and travelers are noted below.) A Federal Court says that the appropriative rule in the West was applied by the earliest settlers to the use of waters for "irrigation, mining, and other beneficial purposes." 129/

Stock watering.-- The statute governing the appropriation of water contains a section which, as amended in 1941, provides that: 130/

> This article shall not be construed to apply to stockmen or stock owners who may build or construct water tanks or ponds for the purpose of watering stock which have a capacity of ten [10] acre-feet of water or less.

The supreme court has held that the use of water in stock raising is a beneficial use for which water may be appropriated. 131/

Definition of domestic use.-- The meaning of the term "domestic use", as used in an ordinance of the City of Albuquerque, was defined by the supreme court as follows: 132/

> Domestic use, as the term is used in the ordinance fixing the schedule of rates to be charged, means the use to which water is applied by the family, or for family use, and includes all uses to which water is applied around the home, and includes the watering of animals, but it does not include the use of water in public parks or public pleasure resorts maintained by the city, or the temporary quenching of the thirst of animals while engaged in labor upon the streets.

128/ State ex rel. State Game Commission v. Red River Valley Co., 51 N. Mex. 207, 218, 182 Pac. (2d) 421 (1945-1947).

129/ Lindsey v. McClure, 136 Fed. (2d) 65, 69 (C.C.A. 10th, 1943).

130/ N. Mex. Stats. 1953, Ann., sec. 75-8-3.

131/ Farmers' Development Co. v. Rayado Land & Irr. Co., 28 N. Mex. 357, 371, 213 Pac. 202 (1923); First State Bank of Alamogordo v. McNew, 33 N. Mex. 414, 422, 269 Pac. 56 (1928). In this last case the court held that the water right for stock-raising purposes was appurtenant to the possessory right in the range land on which the water was being beneficially used but was not appurtenant to any particular part of the range.

132/ Water Supply Co. of Albuquerque v. Albuquerque, 17 N. Mex. 326, 334, 128 Pac. 77 (1912).

Use of water by travelers.--All currents and sources of water, such as springs, rivers, ditches, and currents flowing from natural sources, are declared by the water appropriation statute to be free for all travelers to take water for their own use and for the animals under their charge. 133/ Travelers with large numbers of animals must get the consent of the owners of the spring, and must pay for damage. The provision does not apply to wells, nor to ponds or reservoirs constructed by persons for their own proper use and benefit.

Use of water in upper valleys of streams.--The natural right of people living in the upper valleys of stream systems to impound and utilize a reasonable share of the waters precipitated upon and having their source in such valleys and superadjacent mountains, is recognized by statute, the exercise of the right to be subject to the provisions of laws governing the appropriation of water. 134/

Sale, Rental, or Distribution of Water

The statute requires the owner of works for the storage, diversion, or carriage of water, containing water in excess of the owner's needs for the beneficial use for which it was appropriated, to deliver such surplus water to parties entitled to use the same at reasonable and uniform rates, as trustees of such right. 135/

Appropriation for service of water.--The Territorial supreme court held the law to be well settled that water might be diverted from a stream by an individual or a corporation and served to others for their beneficial use. 136/ The beneficial user was held in such case to have constituted the company his agent to divert and conduct the water for his use. This decision was affirmed by the United States Supreme Court, the Court holding that Congress did not intend, in enacting the Desert Land Act, 137/ that surplus water on the public domain must be directly appropriated by the owners of land upon which beneficial use of the water was to be made. 138/ A corporation could be lawfully empowered to become an intermediary for furnishing water to irrigate the lands of third parties, the rights conferred upon irrigation corporations by legislation of Congress being not limited to such corporations as are mere combinations of owners of irrigable land -- in other words, not limited to mutual irrigation companies.

A corporation organized to furnish water for use on the lands of others, therefore, may appropriate water for such purpose. 139/ Under an arrangement by which an irrigation company constructs works and sells land to farmers under contracts providing for the delivery

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133/ N. Mex. Stats. 1953, Ann., secs. 75-1-4 and 75-1-5.
134/ N. Mex. Stats. 1953, Ann., sec. 75-5-27.
135/ N. Mex. Stats. 1953, Ann., sec. 77-5-16.
136/ Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 240-241, 61 Pac. 357 (1900).
137. 19 Stat. L. 377, March 3, 1877.
138/ Gutierres v. Albuquerque Land & Irr. Co., 188 U. S. 545, 555-556 (1903).
139/ Hagerman Irr. Co. v. McMurry, 16 N. Mex. 172, 182, 113 Pac. 823 (1911).

of water to the lands, the water right becomes appurtenant to the land irrigated and belongs to the landowner. 140/ The property right in the irrigation works is in the ditch company, which becomes an intermediary agent of the owner of the land and water right for the purpose of providing him with water.

Right of consumer to receive water as easement.--Under a contract between an irrigation company and a water consumer providing perpetual rights and obligations for both parties, the company is a carrier of a stated quantity of water for the consumer, and the right acquired by the latter constitutes an easement in the irrigation ditch of the company. 141/

Relative Rights of Senior and Junior Appropriators

The right of a junior appropriator to the use of water is at all times subservient to the primary right of prior appropriators to the use of the same water, and can be exercised only after the needs of the prior appropriators have been supplied. 142/ The prior appropriator, however, is limited to the quantity of water which he has validly appropriated, and any surplus water over such quantity can be appropriated by others later in time. 143/ Furthermore, as the court said in another case: 144/

> No one is entitled to waste water. When his requirements have been satisfied, he no longer has a right to the use of water, but must permit others to use it.

The supreme court has adopted the rule that in contests over water rights, prior appropriators who complain of injury must prove that their use of water is reasonable and beneficial, and the junior appropriator then must show that there is a surplus in the source of supply from which water may be taken without injuring prior rights. 145/

Protection of Appropriative Right

A right to the continued use of a vested and accrued water right will be maintained and protected as fully as the right to a continued use of the easement in the works by which the use of the water and water right is effectuated. 146/

140/ Murphy v. Kerr, 296 Fed. 536, 545 (D. N. Mex., 1923).

141/ Bolles v. Pecos Irr. Co., 23 N. Mex. 32, 41, 167 Pac. 280 (1917); Murphy v. Kerr, 296 Fed. 536, 546-549 (D. N. Mex. 1923), affirmed 5 Fed. (2d) 908 (C.C.A. 8th, 1925).

142/ Harkey v. Smith, 31 N. Mex. 521, 530-531, 247 Pac. 550 (1926).

143/ State ex rel. Community Ditches v. Tularosa Community Ditch, 19 N. Mex. 352, 371, 143 Pac. 207 (1914).

144/ Snow v. Abalos, 18 N. Mex. 681, 695, 140 Pac. 1044 (1914). See also Harkey v. Smith, 31 N. Mex. 521, 531, 247 Pac. 550 (1926).

145/ Pecos Valley Artesian Conservancy Dist. v. Peters, 52 N. Mex. 148, 152-154, 193 Pac. (2d) 418 (1948).

146/ First State Bank of Alamogordo v. McNew, 33 N. Mex. 414, 437, 269 Pac. 56 (1928).

EXERCISE OF THE APPROPRIATIVE RIGHT

Efficiency of Irrigation Practices

In exercising one's irrigation water right the irrigator is subject to the maxim sic utere tuo ut alienum non laedas. This rule was invoked in a case in which it appeared that defendant had applied water to its land in such manner that the excess flowed down and stood upon plaintiff's adjacent land to the injury of his crops. 147/ In affirming the judgment of the trial court awarding damages and an injunction, the New Mexico Supreme Court observed that there was no question in the case as to the right of the defendant to use reasonable quantities of water for the purpose of irrigating its land. It was the application of unnecessary water "negligently and willfully" to which the injunction related. The supreme court cited an early California decision to the effect that an action could not be maintained against an irrigator for the reasonable exercise of his right, even though annoyance or injury might be occasioned to adjoining landowners; the irrigator's responsibility being only for injuries caused by his negligence or unskillfulness, or for injuries willfully inflicted in the exercise of his right to irrigate his land. 148/

Rotation in Use of Water

The State supreme court referred to rotation in the use of water in a case in which, however, the right to compel rotation was not in issue. 149/ It was stated that this case differed from those arising in connection with community ditches, "where all of the rights are usually of the same dignity, and rotation is frequently awarded as a means of dividing the water on equitable basis."

The United States Supreme Court held that the States of New Mexico and Colorado had the power to bind, by compact, their respective appropriators by division of the flow of an interstate stream, either by continuous equal division of the water from time to time in the stream, or by providing for rotation involving alternate periods of flow of the entire stream, first to one State and then to the other. 150/ The rotating supply authorized by the compact, and agreed upon by the two State Engineers, was considered to be clearly more beneficial than would have been the case had the flow been divided between the States continuously in equal parts.

147/ Stroup v. Frank A. Hubbell Co., 27 N. Mex. 35, 37-39, 192 Pac. 519 (1920).
148/ Gibson v. Puchta, 33 Calif. 310, 316-317 (1867).
149/ Harkey v. Smith, 31 N. Mex. 521, 530-531, 247 Pac. 550 (1926).
150/ Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92, 108 (1938).

Exchange of Water

Water may be delivered into any ditch, stream, or watercourse to supply appropriations therefrom in exchange for water taken either above or below such point of delivery, less transmission losses determined by the State Engineer, if the rights of others are not injured thereby. 151/ This statutory provision was held unconstitutional by the State supreme court insofar as it authorized the taking of a property right without compensation. 152/ The court conceded that the State had power to compel the owner of a ditch to permit the carriage of water therein belonging to other persons, upon the ground that the duty and privilege of carrying water for irrigation purposes is a public duty and privilege and may be exercised only by permission of the State and upon such terms as the State may prescribe. Nevertheless, said the court, it remains true that the private property of a citizen may not be taken without provision for compensation. Here the statute does not provide for compensation to the owner of a ditch in a case in which one attempts to take advantage of the statute. The State can compel such portage of water as a public duty only when just compensation is made. The inapplicability of this holding to the use of a natural stream was emphasized in the following language (at 20 N. Mex. 614):

> In this connection it is to be understood that this holding is for the purposes of this case and like cases only, where the question is as to the right to use a senior ditch, constructed and maintained at cost to the owners, without compensation, and has no application to cases where the right to use natural streams and water courses is involved. In the latter class of cases we can see no objection to the statute.

Changes in Exercise of Rights

An appropriator, with the approval of the State Engineer, may use water for a purpose other than the purpose for which the water was appropriated, or may change the place of diversion, storage, or use, provided that no change may be allowed to the detriment of holders of valid and existing rights on the stream system. 153/ This authorization is subject to making the change in the manner and under the conditions prescribed in certain other sections of the statute. 154/

151/ N. Mex. Stats. 1953, Ann., sec. 75-5-24.

152/ Miller v. Hagerman Irr. Co., 20 N. Mex. 604, 612-614, 151 Pac. 763 (1915).

153/ N. Mex. Stats. 1953, Ann., sec. 75-5-23.

154/ These are secs. 75-5-3 and 75-5-22. Sec. 75-5-3 provides that a change in a proposed point of diversion in an application to appropriate water shall be subject to the provisions of sec. 75-5-23 and the rules and regulations of the State Engineer. Sec. 75-5-22 authorizes the severance of a water right from land to which it is appurtenant, with the consent of the owner of the land, and its simultaneous transfer and appurtenance to other land or other purposes, without losing priority of right, if such change can be made without detriment to existing rights, on the approval of an application to the State Engineer; notice to be published prior to the approval of the application.

A Federal court, after citing statutes of New Mexico and Colorado with reference to changes in the exercise of water rights, stated that: 155/

> However, a water right is a property right and inherent therein is the right to change the place of diversion, storage, or use of the water if the rights of other water users will not be injured thereby. Hence, the statutes above referred to are a recognition rather than a grant of the right to make such changes and they merely lay down a procedure whereby it may be determined whether such changes can be effected without injuriously affecting the rights of other users.

The court held in this case that a company had the right to change its places of diversion and storage from points in Colorado to points in New Mexico, if such changes could be effected without injury to other water users, and that it was not necessary to obtain the approval of such changes by authorities in either State. In neither State did public authorities have jurisdiction to authorize changes from points in one State to points in another.

The State supreme court observed, in a case involving the transfer of a possessory right in range land on the public domain and a stock-water right that had become appurtenant to the possessory right in the land, that the holder "undoubtedly had the legal right to change the character and place of use of the water." 156/

Community acequias constructed and in operation prior to the passage of the 1907 statute are not subject to the jurisdiction of the State Engineer with respect to changes in their points of diversion. 157/

LOSS OF WATER RIGHTS

Abandonment and Statutory Forfeiture

Abandonment and statutory forfeiture have not been clearly distinguished in the court decisions of New Mexico as separate methods of losing water rights.

A section of the appropriation statute enacted in 1907 provided that when the holder of a water right failed to use beneficially all

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155/ Lindsey v. McClure, 136 Fed. (2d) 65, 70 (C.C.A. 10th, 1943).
156/ First State Bank of Alamogordo v. McNew, 33 N. Mex. 414, 422-423, 269 Pac. 56 (1928).
157/ N. Mex. Stats. 1953, Ann., sec. 75-14-60. See Pueblo of Isleta v. Tondre & Pickard, 18 N. Mex. 388, 395-396, 137 Pac. 86 (1913).

or a part thereof for a period of four years, except in case of waters for storage reservoirs, such unused water should revert to the public and be regarded as unappropriated public water. 158/

Prior to the enactment of the statute, the supreme court had stated that an appropriative right may be lost by nonuse. 159/ After the statute had been enacted, the court referred to the provision concerning loss of a water right because of failure to use the water beneficially for a period of four years, and stated that: 160/

> The statute was merely declaratory of the law as it had already been established in this jurisdiction by repeated judicial decisions, except that by those decisions the time within which the application must be made was not any definite period, but a reasonable time, depending, to some extent, on the circumstances of the particular case. * * * If the application to beneficial use is made in proper time, it relates back and completes the appropriation as of the time when it was initiated. To hold that a formal appropriation, without use, would hold for twenty years, twice the time necessary to obtain title to real estate by adverse possession in New Mexico, would be contrary to the essential nature of the law of waters as established here, which, as to this feature, has been summed up in the words now embodied in our statute law above referred to: "Beneficial use shall be the basis, the measure and the limit of all right to the use of water." * * *

Relation to Seasonal Use

The statute concerning forfeiture of the water right for nonuse for a period of four years refers to quantity of water and not to periods of use, and does not apply to a case in which the holder of the water right has used the entire appropriated quantity beneficially each year since the initiation of the right, although no use was made during the winter. 161/ Even though the appropriator had not used the water in the winter, he did not lose his right to do so under the circumstances of this case.

Circumstances Beyond Control of Appropriator

When water fails to reach the point of diversion of an appropriator without his fault, and he is at all times ready and willing to

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158/ N. Mex. Stats. 1953, Ann., sec. 75-5-26. This section, as amended in 1941, now contains a proviso concerning circumstances beyond the control of the owner, which is discussed below.

159/ Albuquerque Land & Irr. Co. v. Gutierrez, 10 N. Mex. 177, 237-238, 61 Pac. 357 (1900).

160/ Hagerman Irr. Co. v. McMurry, 16 N. Mex. 172, 180, 113 Pac. 823 (1911). In Pioneer Irrigating Ditch Co. v. Blashek, 41 N. Mex. 99, 102, 64 Pac. (2d) 388 (1937), the court held that the testimony did not prove an abandonment of the water right in litigation.

161/ Harkey v. Smith, 31 N. Mex. 521, 528-529, 247 Pac. 550 (1926).

put the water to the usual beneficial use, there is no forfeiture of his right for nonuser. 162/

The statute relating to forfeiture for nonuse was amended in 1941 to include the following proviso: 163/

> Provided, however, that forfeiture shall not necessarily occur if circumstances beyond the control of the owner have caused nonuse, such that the water could not be placed to beneficial use by diligent efforts of the owner.

The supreme court referred to this statute in a case decided in 1950, and held that under the conditions shown to exist in the case at bar, forfeiture did not take place. 164/ The court said that: "Our statutes recognize the unfairness in loss of a water right through nonuse where conditions beyond the control of the owner of such right prevent use."

Adverse Possession and Use

Adverse use of water of an artificial acequia for a period of 40 years, continuously and uninterruptedly, with the knowledge and acquiescence of the owner of the land crossed by the acequia, was held in a fairly early case to be sufficient proof of the existence of an easement in the absence of evidence of any permission or license. 165/

In a case decided in 1949 the supreme court held that under the circumstances of the case a right to the use of water appropriated by certain parties had not been acquired by adverse parties by limitation or prescription. 166/ Limitation did not begin to run from the date water was used by the adverse parties, but from the date their use deprived the holders of the water right of their appropriated water.

The supreme court, in referring to the testimony introduced in another case, said that the testimony did not prove an abandonment of the water right in question, "nor a prescriptive right (if such a right can be acquired under our law)". 167/

162/ New Mexico Products Co. v. New Mexico Power Co., 42 N. Mex. 311, 321, 77 Pac. (2d) 634 (1937, 1938). The court cited Pioneer Irrigating Ditch Co. v. Blashek, 41 N. Mex. 99, 64 Pac. (2d) 388 (1937).

163/ N. Mex. Stats. 1953, Ann., sec. 75-5-26. The amendment was made in Laws 1941, ch. 126, sec. 16.

164/ Chavez v. Gutierrez, 54 N. Mex. 76, 82, 213 Pac. (2d) 597 (1950). The evidence showed that throughout periods of nonuse, droughts producing shortages of water and the progressively increasing depth and width of a canyon across a part of the tract to which the water right had been appurtenant, all combined to render irrigation impracticable or impossible. The court said that the evidence convincingly established the fact that the holders of the water right irrigated their land when they could get water to and for it.

165/ Trambley v. Luterman, 6 N. Mex. 15, 23-24, 26 (1891). A subsequent holder of such land was held to take subject to the easement, having a qualified right to the use of so much of the water as would not deprive the holder of the easement of sufficient water to exercise his right.

166/ Bounds v. Carner, 53 N. Mex. 234, 245, 205 Pac. (2d) 216 (1949).

167/ Pioneer Irrigating Ditch Co. v. Blashek, 41 N. Mex. 99, 102, 64 Pac. (2d) 388 (1937).

Estoppel

The supreme court considered the question of estoppel at length in one decision and observed that: 168/

> Questions relative to estoppel are not in general controlled by technical rules, but are usually determined upon principles of equity and good conscience. * * *
>
> Appellant urges that, in order to create estoppel, there must be a degree of moral turpitude involved. This is another way of saying that there can be no estoppel without fraud. But, conceding this to be the law, still it is fraud to deny that which has been previously affirmed. * * *

The syllabus by the court states the following principles:

> 6. One who, by his renunciation or disclaimer of a right or title, has induced another to believe and act thereon, is estopped afterwards to assert such right or title.
>
> 7. A representation as to the construction and effect of a judgment of obscure and doubtful meaning is good as an estoppel, if believed and acted upon.
>
> 8. Where one's conduct has led another to take a position detrimental to his interest, the former will not be heard to say that he is not estopped because of his ignorance of his legal rights in the first instance, provided he has full knowledge of the facts.

The officers of an organization who stand by and allow another organization to enlarge the ditch of which they have control, and to expend money and labor on the common ditch with the understanding that the second organization has acquired an interest in the same, are estopped to deny the right of the latter. 169/

But where a party, such as a prior appropriator, is not bound to object to an action of another, such as a junior appropriator, his failure to object does not deprive him of his remedy. 170/

168/ La Luz Community Ditch Co. v. Alamogordo, 34 N. Mex. 127, 141, 145, 279 Pac. 72 (1929). See Martinez v. Cook, 56 N. Mex. 343, 352, 244 Pac. (2d) 134 (1952).

169/ Halford Ditch Co. v. Independent Ditch Co., 22 N. Mex. 169, 175, 159 Pac. 860 (1916).

170/ Trambley v. Luterman, 6 N. Mex. 15, 26, 27 Pac. 312 (1891). The first appropriator of part of the water of an acequia saw a later settler build his establishment and knew that he would require some water, but did not know and was not informed that the quantity required would interfere with the prior right. Hence the prior appropriator was under no obligation to speak.

ADJUDICATION OF WATER RIGHTS

The statute governing the appropriation of water contains procedure for the adjudication of water rights. 171/ Such adjudications are made exclusively in the courts. Upon completion of the hydrographic survey of any stream system by the State Engineer, the Attorney General is authorized to initiate a suit on behalf of the State to determine all water rights concerned, unless such suit has been brought by private parties. Also, the Attorney General is directed to intervene on behalf of the State in a suit begun by private parties, if notified by the State Engineer that in his opinion the public interest requires it. In any suit to determine water rights all claimants are to be made parties, and the court is required by statute to direct the State Engineer to furnish a complete hydrographic survey. Upon the adjudication of rights to the use of waters of a stream system, a decree is issued adjudging the several water rights to the parties involved, containing all conditions necessary to define the right and its priority.

A suit decided in 1931 involved questions relating to both ground waters and stream waters. 172/ Jurisdictional principles so decided are stated in the syllabus prepared by the court as follows:

> 1. A statutory suit to adjudicate water rights of stream system is all-embracing, and includes claimed rights of appropriators from artesian basin within such system.
>
> 2. The jurisdiction of the district court in which is pending a suit to adjudicate water rights of stream system is exclusive of jurisdiction of another district court to entertain suit of artesian basin appropriators attacking right of stream appropriator asserted in adjudication suit or claiming a priority over it.

A suit to adjudicate water rights is of the nature of a suit to quiet title to realty. 173/ Principles relating to the burden of proof in water cases, decided in this case, are discussed elsewhere. (See "Relative rights of senior and junior appropriators," p. 30 and "Regulation of artesian wells," p. 57, 58.)

ADMINISTRATION OF WATER RIGHTS AND DISTRIBUTION OF WATER

The State Engineer has supervision over the apportionment of waters, may create water districts, and may appoint watermasters

171/ N. Mex. Stats. 1953, Ann., secs. 75-4-2 to 75-4-10.
172/ El Paso & R. I. Ry. v. District Court, 36 N. Mex. 94, 95, 8 Pac. (2d) 1064 (1931, 1932).
173/ Pecos Valley Artesian Conservancy Dist. v. Peters, 52 N. Mex. 148, 154, 193 Pac. (2d) 418 (1948).

upon application of water users within districts. 174/ Such supervision extends to licenses issued by the State Engineer and his predecessors and to the adjudications of the courts. 175/ Community acequias established and in operation at the time of enactment of the water law of 1907 are accorded certain preferences with respect to public regulation, as noted heretofore (see "Water rights of community acequias," p. 4-6).

INTERSTATE MATTERS

Rights of Use of Interstate Streams

Appropriation in One State for Use in Another State

The supreme court had for decision the question as to whether the Territorial Engineer had statutory authority to issue a license for the appropriation of water for the irrigation of lands in New Mexico from a stream flowing from Colorado into New Mexico when the point of diversion proposed was in Colorado. 176/ The statute gave the Territorial Engineer jurisdiction over natural waters flowing in streams and watercourses within the limits of New Mexico. Apparently, had there been an appropriation by a diversion in Colorado and a beneficial use in New Mexico, private rights independent of State lines would have vested and would be protected. However, the court concluded that the New Mexico legislature did not intend to give the engineer any authority to grant permits beyond the boundaries of New Mexico.

A Federal court stated that: 177/

> A water right may be acquired under the doctrine of prior appropriation by the diversion of water at a point on a stream in one state and its application to beneficial use on lands in another state where the stream flows in both states.

Changes in Exercise of Water Rights

The right to change the place of diversion, storage, or use of an appropriative right, without detriment to existing rights, is a feature of the law of prior appropriation and exists even independently of State statute. 178/ The water statutes of New Mexico and Colorado have no

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174/ N. Mex. Stats. 1953, Ann., secs. 75-2-1 to 75-3-5.

175/ N. Mex. Stats. 1953, Ann., sec. 75-2-9. See Pueblo of Isleta v. Tondre & Pickard, 18 N. Mex. 388, 392, 395, 413-417, 137 Pac. 86 (1913).

176/ Turley v. Furman, 16 N. Mex. 253, 255-257, 114 Pac. 278 (1911).

177/ Lindsey v. McClure, 136 Fed. (2d) 65, 69 (C.C.A. 10th, 1943).

178/ Lindsey v. McClure, 136 Fed. (2d) 65, 69-70 (C.C.A. 10th 1943).

extraterritorial effect, and water authorities of neither State have jurisdiction to authorize the owner of a water right to make changes in its exercise from one State to the other. This right exists in the appropriator, so long as the changes can be effected without injury to holders of other rights, and it is not necessary to obtain approval from officers of either State.

Applicability of Appropriation Doctrine

In the controversy concerning changes in exercise of water rights as between Colorado and New Mexico, referred to above, the Federal court stated that: 179/

> The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. It is not less applicable to interstate streams and controversies than to others and where controversies arise between appropriators from the same stream, but in different states recognizing the doctrine of appropriation, their rights should be judged by the rule of priority.

Jurisdiction of Court

Matters of court jurisdiction of the use of waters of interstate streams were decided with respect to a controversy over the waters of Gila River, arising in New Mexico and flowing into Arizona. 180/

The BROOKS decision dealt with the power of the Arizona court to act where all the parties were before it and were consenting to a decree therein with relation to both Arizona and New Mexico water users. It was held that the court in the lower State had the power to adjudicate water rights of the users from the same stream in the upper State, because that was necessary to a determination of the rights of the lower users. Jurisdiction is concurrent with that of the court in the upper State; and as an incident thereto, the court in the lower State first securing jurisdiction has the power to prevent the parties from litigating their rights in either a State or Federal court in any actions subsequently commenced in the upper State. The uniform holding is that an action to determine such rights is not a transitory action. Nevertheless, in order for the Arizona court to exercise its unquestioned power to settle effectively Arizona water rights on the river it must also reach out and consider the amount of water which should rightly be in the stream when it enters Arizona. Hence, the trial court must consider the question of the rights of upper owners to interfere with the waters in the upper State.

179/ 136 Fed. (2d) at 69.

180/ Brooks v. United States, 119 Fed. (2d) 636, 639-641 (C.C.A. 9th, 1941). Defendants had been adjudged guilty of contempt of court for violating a decree defining water rights on the Gila River, issued by the Federal court for the District of Arizona. It was a consent decree, and defendants, who owned land in New Mexico irrigated from the river, had been parties to it. Each of the parties had been enjoined from interfering with the water rights of the other parties to the decree. Defendants now claimed that the Arizona court had no right to consider or determine the rights of the defendants in the waters in New Mexico.

A statute enacted by the State legislature in 1941 provides that: 181/

> In all cases where the rights of owners of land in this state to which water rights on interstate streams are appurtenant have been the subject of litigation in the state or federal courts of an adjoining state, it shall be the duty of the state engineer to assume control of all or any part of such interstate stream and of the diversion and distribution of the waters thereof and to administer the same in the public interest; Provided, however, that this section shall not apply to conservancy districts, irrigation districts or federal reclamation projects in this state.

A Federal court, in a controversy regarding the right to make certain changes in the exercise of water rights from one State to another, referred to this statute undertaking to grant the State Engineer power to control the diversion and distribution of water from interstate streams when certain facts existed, but held that such facts did not exist in the instant case. 182/

Equitable Apportionment of Benefits of Interstate Stream between States

The United States Supreme Court applied the principle of equitable apportionment of benefits between States in a case involving the validity and effect of a compact between Colorado and New Mexico relating to the use of the waters of La Plata River. 183/ (See "Interstate compacts," below.) The Court stated the following rules with respect to the apportionment of interstate waters by compact or decree:

The water of a stream flowing from one State into another that is being used beneficially must be equitably apportioned between the two States. The upper State does not have such ownership or control of the whole stream as to entitle it to divert all the water regardless of any injury or prejudice to the lower State. The rule of equitable apportionment has been consistently applied by the Supreme Court in such controversies. An apportionment made either by compact or by decree of the Supreme Court is binding upon the citizens of each State and all water claimants, even where the State had granted water rights before entering into the compact. An apportionment may contemplate either continuous equal divisions of the water, or rotation of the water. Whether the water of an interstate stream must be apportioned between two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive. The Supreme Court has jurisdiction of such controversies.

181/ N. Mex. Laws 1941, ch. 126, sec. 26; Stats. 1953, Ann., sec. 75-4-11.
182/ Lindsey v. McClure, 136 Fed. (2d) 65, 70 (C.C.A. 10th, 1943).
183/ Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92, 101-111 (1938).

Interstate Compacts

The State of New Mexico is a party to several interstate compacts. 184/

The compact between New Mexico and Colorado relating to the La Plata River flowing from Colorado into New Mexico was construed and approved by the United States Supreme Court. 185/ The compact provided for the division of the water between the two States under certain conditions, and contained the following provision: 186/

> 3. Whenever the flow of the river is so low that in the judgment of the State engineers of the States the greatest beneficial use of its waters may be secured by distributing all of its water successively to the lands in each State in alternating periods, in lieu of delivery of water as provided in the second paragraph of this article, the use of the waters may be so rotated between the two States in such manner, for such periods, and to continue for such time as the State Engineers may jointly determine.

The application of this provision by the two State Engineers was attacked by a ditch company in Colorado in a suit against the Colorado State Engineer, on the ground that under a decree of a Colorado court the ditch company was entitled to divert all the water in the stream except that required to satisfy five senior Colorado priorities. The Supreme Court pointed out that if the company had been permitted to draw all of that water, none would have been available to the New Mexico claimants who under similar laws had made appropriations, some of them being earlier in date than that of the Colorado company. The Supreme Court held that under the principle of an equitable apportionment of benefits between the States, the Colorado decree could not confer upon the company any rights in excess of Colorado's share of the water of the stream, which was only an equitable portion thereof. The fact that the apportionment was made by compact between the States with the consent of Congress made it binding to the same extent as would have been an apportionment by the Court itself. The Court stated (at 304 U. S. 108) that:

> As the States had power to bind by compact their respective appropriators by division of the flow of the stream, they had power to reach that end either by providing for a continuous equal division of the water from time to time in the stream, or by providing for alternate periods of flow to the one State and to the other of all the water in the stream. * * * That such alternate

184/ N. Mex. Stats. 1953, Ann., sec. 75-34-3.
185/ Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U. S. 92, 101-111 (1938).
186/ 304 U. S. at 97.

> rotating flow was then a more efficient use of the stream than if the flow had been steadily divided equally between the Colorado and the New Mexico appropriators was conclusively established by the evidence. That is, the rotating supply which the Compact authorized, and the two State Engineers agreed upon, was clearly more beneficial to the Ditch Company than to have given to it and other Colorado appropriators steadily one-half of the water in the river. The delegation to the State Engineers of the authority to determine when the waters should be so rotated was a matter of detail clearly within the constitutional power. * * *

DIFFUSED SURFACE WATERS

CHARACTERISTICS

The United States Supreme Court held in 1897 that water originating from a cloudburst in mountains and that flowed some miles away through arroyos was simply diffused surface water, the arroyos being not natural watercourses but simply passageways for the rain that fell. 187/ Some years later the New Mexico Supreme Court, although not repudiating the holding in the WALKER case, (to use its own words) "adroitly distinguished" 188/ it in a decision that an arroyo is not prevented from being a natural watercourse merely because water does not run in it during the entire year. 189/ Repudiation, however, was definite in the decision in MARTINEZ v. COOK, rendered in 1952, wherein the New Mexico Supreme Court said that: "Likewise, the holding in the Walker case that because a deep arroyo terminated in the flat country although the water thereafter traveled to a river through defined channels, that dams may be thrown across such channels and the water cast back on higher lands is ill suited to conditions in this state and the case will not longer be followed." 190/ This case has been discussed at greater length under "Watercourses--Characteristics of watercourse," p. 2-4.

The legislature of New Mexico has defined a watercourse, for the purpose of appropriation of water, as "any river, creek, arroyo, canyon, draw, or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water." 191/ The legislative view therefore is in harmony with that of the State supreme court as to the distinction between watercourse and diffused surface water under typical southwestern conditions. The harmony is not marred by the fact that the statute refers to appropriation of

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187/ Walker v. New Mexico & S. P. R. R., 165 U. S. 593, 600-605 (1897).
188/ Martinez v. Cook, 56 N. Mex. 343, 350, 244 Pac. (2d) 134 (1952).
189/ Jaquez Ditch Co. v. Garcia, 17 N. Mex. 160, 162-166, 124 Pac. 891 (1912).
190/ Martinez v. Cook, supra, 56 N. Mex. at 350.
191/ N. Mex. Stats. 1953, Ann., sec. 75-1-1.

water for beneficial use, whereas the court decisions were rendered in cases involving drainage and repulsion of water.

DRAINAGE AND REPULSION

The United States Supreme Court, in a case arising in the then Territory of New Mexico, felt obligated, in the absence of a statute on diffused surface water, to apply the common-law rule as to rights of drainage and repulsion of what it held to be diffused surface water. 192/ That was the WALKER case, noted in the discussion of "Characteristics," above, and also under "Watercourses--Characteristics of watercourse," p. 2-4. The Supreme Court (at 165 U.S. 602) stated the doctrine of the common law to be "that the lower land owner owes no duty to the upper land owner, that each may appropriate all the surface-water that falls upon his own premises, and that the one is under no obligation to receive from the other the flow of any surface-water, but may in the ordinary prosecution of his business and in the improvement of his premises by embankments or otherwise prevent any portion of the surface-water coming from such upper premises."

The New Mexico Supreme Court, in a case decided in 1952, questioned the soundness of the highest Court's statement of the common-law doctrine in the WALKER case. 193/ But aside from that, notwithstanding the adoption by the Territorial legislature of the common law as the rule of practice and decision, the New Mexico courts during the present century had developed this policy (at 56 N. Mex. 349):

> * * * we have limited the operation of the common law and have refused to follow it where its rules were not deemed suitable to our conditions. * * * Particularly, we have never followed it in connection with our waters, but, on the contrary, have followed the Mexican or civil law, and what is called the Colorado doctrine of prior appropriation and beneficial use. * * * We even refused to follow the common law on waters in underground basins having defined boundaries. * * *

The State supreme court in MARTINEZ v. COOK rejected the United States Supreme Court's classification of southwestern arroyos and reasserted its own classification as watercourses. The decision turned on that point preliminarily, and on several additional points

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192/ Walker v. New Mexico & S.P.R.R., 165 U. S. 593, 602, 604-605 (1897), affirming Walker v. New Mexico & S.P.R.R., 7 N. Mex. 282, 287-288, 34 Pac. 43 (1893). The case in the Territorial court was decided on the constitutionality of a practice statute, and did not decide any questions relating to the distinction between watercourse and diffused surface water, or to the rules of law applicable to drainage and repulsion of water.

193/ Martinez v. Cook, 56 N. Mex. 343, 348-349, 244 Pac. (2d) 134 (1952).

other than rights of draining and repelling diffused surface waters. As to the obligation of an upper landowner with respect to such waters, the court said (at 56 N. Mex. 348) that:

> It is agreed by all parties that so long as such waters are in a diffused state and have not reached a natural drainage way or watercourse, an upper landowner may not by artificial means collect and throw them on his lower neighbor in a manner in which they would not flow except for such action.

DEVELOPED WATERS

The principle governing rights of use of developed water was thus stated by the Territorial supreme court in one of its earliest decisions concerning water rights, in a controversy between complainants who were prior appropriators of water from springs near the mouth of a canyon and respondents who later diverted water from the canyon and thereby interfered with the supply of the lower springs at which complainants had been diverting their water supply: 194/

> The respondents, of course, in any event had the right by their labor to increase the flow of water from the mouth of the cañon, over and above that actually appropriated by complainants from the springs and acequia, the right and title to such increase.

SEEPAGE, DRAINAGE, AND RETURN WATERS

SEEPAGE WATERS

A statute enacted in 1941 provides as follows: 195/

> Artificial surface waters, as distinguished from natural surface waters, are hereby defined for the purpose of this act as waters whose appearance or accumulation is due to escape, seepage, loss, waste, drainage, or percolation from constructed works, either directly or indirectly, and which depend for their continuance upon the acts of man.

194/ Keeney v. Carillo, 2 N. Mex. 480, 493 (1883).

195/ N. Mex. Laws 1941, ch. 126, sec. 21; Stats. 1953, Ann., sec. 75-5-25. This enactment replaces a section of the original 1907 water appropriation statute giving the owner of constructed works the first right to the use of seepage waters therefrom upon filing an application with the State Engineer within one year after completion of the works or appearance of the seepage, any party thereafter being allowed to appropriate the seepage water upon application to the State Engineer and upon paying the owner of the works reasonable compensation for storing or carrying the water.

> Such artificial waters are primarily private and subject to beneficial use by the owner or developer thereof; Provided, that when such waters pass unused beyond the domain of the owner or developer and are deposited in a natural stream or watercourse and have not been applied to beneficial use by such owner or developer for a period of four [4] years from the first appearance thereof, they shall be subject to appropriation and use; Provided, that no appropriator can acquire a right, excepting by contract, grant, dedication, or condemnation, as against the owner or developer compelling him to continue such water supply.

Rights of use of seepage appearing from an unknown source were involved in a decision of the Territorial supreme court. 196/ The water increased in extent until it crossed a road and entered adjoining land of a party who used the water for irrigation of such land. A third party applied to the Territorial Engineer for a permit to appropriate the water. The supreme court held that the then existing statute concerning appropriation of seepage water applied only to seepage from constructed works, which was not the case here. Therefore, the Territorial Engineer had no authority to issue a permit to appropriate the water. This water while on the land on which it arose and on the land on which it was being used was not subject to appropriation by any other party without the consent of the owners of such lands. The court concluded that the rights of the existing user were subject to the prior right of the party on whose land the water arose to apply the water to a beneficial use thereon, the surplus being appropriable for use by the adjoining user. Any surplus that might exist beyond the requirements of these two parties would not be subject to appropriation under the statute, but if appropriable at all without their consent, would be governed by the general western law of prior appropriation.

DRAINAGE WATERS

Drainage water flowing in an artificial drainage system has been held not subject to appropriation as against the owner of the works. 197/ The creator of such flow is the owner of the water so long as confined to his own property. When such waters are deposited in a natural stream and the creator of the flow has lost dominion over the same, they then become a part of the stream and are subject to appropriation and use therefrom; but the appropriator can acquire no right as against the creator of the flow to require him to continue supplying such waters to the stream. Artificial waters are not appropriable under the statutes or constitution of New Mexico, nor in the absence of statute.

196/ Vanderwork v. Hewes and Dean, 15 N. Mex. 439, 445-449, 110 Pac. 567 (1910).

197/ Hagerman Irr. Co. v. East Grand Plains Drainage Dist., 25 N. Mex. 649, 653-658, 187 Pac. 555 (1920).

RETURN WATERS FROM IRRIGATION

The State Engineer is authorized by the statute to approve applications to appropriate flood waters upstream under conditions that would result in a considerable return flow above the works of other appropriators and thus not deprive the latter of water to the extent of their reasonable requirements. 198/

SPRING WATERS

An appropriator of the flow from springs fed by an underground stream has been protected against interference with water in a marsh which was shown to be a part of the stream. 199/ The court considered the law clear that: "A subterranean stream which supplies a spring with water, cannot be diverted by the proprietor above, for the mere purpose of appropriating the water to his own use".

As against an attempted appropriation under the statute, the New Mexico Supreme Court held that seepage or spring water appearing on the surface from an unknown source, which did not flow upon the premises in a defined stream, belonged to the landowner. 200/ This has been discussed under the title "Seepage waters," p. 44, 45.

Again in 1951-52 the supreme court held that waters from springs which do not flow in a natural channel, but sink in the soil, are not subject to appropriation. 201/ "The law of appropriating water does not apply to springs which do not have a well defined channel through which the water can flow." The waters of the small springs in litigation, which did not flow from the tract but sank in the ground, were not included within the constitutional and statutory declarations of appropriable waters (see "Watercourses--Appropriation of water--Waters subject to appropriation," p. 11-13). Such waters, under the holding in the VANDERWORK case, supra, belong to the owner of the land upon which the springs occur.

"However," said the supreme court, "if the water rises to the surface and thereafter flows in a stream so as to form a definite channel, it may be appropriated." 202/

The springs in BURGETT v. CALENTINE, above cited, were situated on land owned by the State of New Mexico. Title to this land had been conveyed to the State by the United States after the first purported appropriation of the spring waters by a settler on adjacent public land for use thereon. This settler was predecessor in title of the plaintiffs. After stating the general principle

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198/ N. Mex. Stats. 1953, Ann., sec. 75-5-28.
199/ Keeney v. Carillo, 2 N. Mex. 480, 495-496 (1883).
200/ Vanderwork v. Hewes and Dean, 15 N. Mex. 439, 445-449, 110 Pac. 567 (1910).
201/ Burgett v. Calentine, 56 N. Mex. 194, 196-197, 242 Pac. (2d) 276 (1951, 1952).
202/ Burgett v. Calentine, supra, 56 N. Mex. at 196. The only New Mexico case cited was Keeney v. Carillo, 2 N. Mex. 480 (1883).

that in the absence of a provision making the State subject to the statute of limitations, no title by adverse possession can be acquired against either the State or the United States, no matter how long continued, the court held (at 56 N. Mex. 197) that:

> Thus, the mere fact that the plaintiffs and their predecessors in title made improvements on land owned by the United States and later by the State and thereafter used the water of the springs in question, continuously for over sixty years, did not vest them with an easement.

GROUND WATERS

New Mexico was not the first State to enact ground-water legislation. However, the New Mexico statute, after having been declared unconstitutional and subsequently reenacted in corrected form, was the first of the Western State ground-water administrative acts to be put into extensive operation and has set the pattern for much of the subsequent legislation in that field in the West. The constitutionality of the present statute was sustained, under attack, nearly 20 years after its enactment.

APPROPRIATION OF GROUND WATER

Extant Legislation

Statutory Provisions

The ground-water appropriation statute now in effect was enacted in 1931 to replace legislation enacted in 1927 which had been declared invalid because of technical defects. 203/ There have been some amendments and additions to the 1931 law, chiefly in 1953.

The act declares (sec. 75-11-1) that:

> The water of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably ascertainable boundaries, are hereby declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use.

The legislature in 1953 added several provisions to the ground water statutes. Except for the section containing an emergency clause, these are included in the 1953 codification as follows: 204/

203/ N. Mex. Laws 1931, ch. 131; Stats. 1953, Ann., secs. 75-11-1 to 75-11-12.
204/ N. Mex. Laws 1953, ch. 64; Stats. 1953, Ann., secs. 75-11-19 to 75-11-22.

> 75-11-19. For the purposes of this act [75-11-19 to 75-11-22] all underground waters of the state of New Mexico are hereby declared to be public waters and to belong to the public of the state of New Mexico and to be subject to appropriaction for beneficial use within the state of New Mexico. All existing rights to the beneficial use of such waters are hereby recognized.
>
> 75-11-20. No person shall withdraw water from any underground source in the state of New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state or by drilling a well outside the boundaries of the state and pumping water from under lands lying within the territorial boundaries of the state of New Mexico.
>
> 75-11-21. No permit and license to appropriate underground waters shall be required except in basins declared by the state engineer to have reasonably ascertainable boundaries.
>
> 75-11-22. The state engineer and the attorney general or the various district attorneys are authorized and directed to use any and all legal means necessary to enforce the provisions of this act [75-11-19 to 75-11-22].

Beneficial use is declared in the 1931 act to be the basis, the measure, and the limit to the right to the use of the waters described in the act (sec. 75-11-2).

Intending appropriators for irrigation or industrial uses of water are required to make application to the State Engineer for permits. If no objections are filed, and the State Engineer finds that there are unappropriated waters in the designated ground-water source, or that the proposed appropriation would not impair existing water rights attaching to such source, he issues a permit to appropriate all or part of the waters applied for, subject to the rights of prior appropriators from that source of supply. If protests are filed, the State Engineer holds a hearing before granting or denying the application. (Sec. 75-11-3.)

The statute recognizes existing rights based upon application of the water to beneficial use, and the priorities of such rights (sec. 75-11-4). Claimants of vested ground-water rights may file declarations of their claims (secs. 75-11-5 and 75-11-6). Changes in location of wells or use of water may be made with the approval of the State Engineer, after hearings, upon showing that the change will not impair existing rights (sec. 75-11-7). Ground-water rights not exercised for four years are declared to be forfeited (sec. 75-

11-8). Appeals from decisions of the State Engineer may be taken to the courts (sec. 75-11-10). The State Engineer formulates rules and regulations for administering the act (sec. 75-11-11).

Constitutionality

The constitutionality of the 1931 statute was taken for granted for years after its enactment, chiefly because of the statements of the supreme court in the previous decision in YEO v. TWEEDY, 205/ noted below. However, the validity of the statute was finally contested by defendants in three suits brought by the State for the purpose of enjoining the unlawful use for irrigation purposes of waters drawn from the Roswell Artesian Basin and the valley fill above it, and was sustained in 1950 in the case of STATE ex. rel. BLISS v. DORITY. 206/

The Dority case.--The New Mexico Supreme Court held in the DORITY case that the State Engineer has jurisdiction over the waters of underground sources named in the statute and declared to be public waters. It was held (at 55 N. Mex. 18-19) that the State Engineer's jurisdiction to determine the outer boundaries of such bodies of ground water since the passage of the 1931 act is implicit in that act, and that no judicial determination of the boundaries is necessary to the exercise of such jurisdiction. It was further held (at 55 N. Mex. 19) that the statutory manner of acquiring any right to the use of water from such sources is exclusive; that the court had so held with reference to the general irrigation law of 1907 207/; that the same legal principles applied to the ground waters in litigation in the instant case; and hence, that no right to the use of such water had been obtained by its use by the defendants in violation of the statute.

The principal question raised in the case was whether the statute of 1931 was unconstitutional on the grounds that it authorized the State to deprive persons of their property without due process of law, denied them the equal protection of the laws, and authorized the taking of private property for public use without just compensation. The court stated (at 55 N. Mex. 19-28) that the whole argument of such invalidity was based on the assumption that the waters covered by the statute belonged to the owners of the overlying land, but that that question had been settled by the New Mexico Supreme Court in YEO v. TWEEDY. Furthermore, the correctness of the statement in YEO v. TWEEDY to the effect that it has always been the law in New Mexico that the waters described in the statute belonged to the public and were subject to appropriation was considered of little importance, because the waters involved in the instant suit had been reserved for the people of New Mexico to be disposed of under its laws and court

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205/ Yeo v. Tweedy, 34 N. Mex. 611, 286 Pac. 970 (1929, 1930).

206/ State ex rel. Bliss v. Dority, 55 N. Mex. 12, 225 Pac. (2d) 1007 (1950). Appeal dismissed for the want of a substantial Federal question: Dority v. State of New Mexico ex rel. Bliss, 341 U. S. 924 (1951).

207/ Citing Harkey v. Smith, 31 N. Mex. 521, 247 Pac. 550 (1926).

decisions pursuant to the Congressional Desert Land Act. 208/ The Desert Land Act was not intended to be limited to waters on the surface of the earth; waters of underground streams with defined boundaries always have been subject to appropriation. No interest in waters that might be used for irrigation was conveyed by a United States patent. The court said (at 55 N. Mex. 28): "We hold that under the Federal law and that of New Mexico the waters described in Sec. 1 of the Act of 1931 are subject to appropriation under that Act."

The supreme court dismissed the contention that the statute of 1931 was vague and uncertain in making waters "having reasonably ascertainable boundaries" the standard by which the public character of ground water is determined (at 55 N. Mex. 28-30). The word "reasonably" was construed in the sense of "sufficiently". The east, south, and west boundaries of the basin in litigation had been determined. The lands of the defendants lay toward the south end of the basin, and there were hundreds of wells to the north. The court held that the establishment of the three boundaries, and the circumstance that the north boundary existed but could be ascertained with precision only by the unnecessary drilling of wells, made for all practical purposes a sufficient establishment of the boundaries of the basin. Furthermore, the 1931 statute had been in effect for 19 years, and had been successfully applied in the administration of a number of ground-water sources covering several hundred thousand acres and involving irrigated lands of the value of many millions of dollars. The court said (at 55 N. Mex. 30) that:

> It would be anomalous indeed if this court, after such a history of successful application of the statute should now determine that it is void for vagueness and uncertainty. The statute is not void for the reasons stated.

The court held likewise that the decision in YEO v. TWEEDY had become stare decisis. It had been held in that case that even in the absence of statute, the waters of an artesian basin the boundaries of which have been ascertained, were subject to appropriation. The supreme court stated, in the instant case (at 55 N. Mex. 31), that:

> There is another consideration which requires the affirmance of the trial court's decree. The decision of Yeo v. Tweedy, supra, has become a rule of property. In the nineteen years since that decision it may be assumed that many thousands of acres of the one hundred thousand irrigated with water from the Roswell Artesian basin and the valley fill have been sold to purchasers who relied on that decision as determining title to the right to use the water here involved, and the water rights to which would be injured or destroyed if Yeo v.

208/ 19 Stat. L. 377 (March 3, 1877).

> Tweedy is overruled. Whether it stated the correct rule of law (and we are of the opinion that it did), it is now a rule of property that we will not disturb. * * *

With respect to the ownership of the waters involved in the instant litigation, the court concluded (at 55 N. Mex. 31) as follows:

> The parties have stipulated in this court to facts that show all lands of defendants involved here were patented after March 1877, the date of the Desert Land Act; and before the Act of 1931. We have concluded that the water involved was reserved, on or before the date the Desert Land Act became effective, to the State of New Mexico as trustee for the public, and subject to its use by the public at any time thereafter, by authority of the state statutes, even though passed after the date of the patents to the lands of the defendants. The patents to defendants' lands carried no right to the use of water, except as to that actually applied to the reclaiming of land under the Desert Land Act, and not thereafter abandoned. All other water belonged to the State as trustee for the public.

Court Decisions Prior to Legislation

The New Mexico Supreme Court, in the earliest decision in which it discussed rights to the use of ground waters--one of the very few ground-water decisions rendered prior to the enactment of the 1927 legislation--differentiated, in both law and fact, between definite underground streams and percolating ground waters. 209/ Waters artificially drained from a marsh into the natural channel of a canyon, in which the water flowed partly on the surface and partly under the surface to springs on which appropriations had been made, were held to be part of a defined underground stream, and not a case of percolating water within the meaning of the law. The court held that a well-defined and constant stream in a subterranean channel is protected as much as though it ran through a natural channel on the surface, and that such a stream supplying a spring cannot be diverted to the injury of the holder of a prior appropriative right relating to the spring. The law regarding percolating waters was different, said the court, because of their diffusion through the earth and the resulting difficulty of controlling them.

A later case -- VANDERWORK v. HEWES and DEAN 210/ -- involved water originating from seepage but diffused over the ground, which the court called seepage water or spring water from some unknown

209/ Keeney v. Carillo, 2 N. Mex. 480, 495-496 (1883).
210/ Vanderwork v. Hewes and Dean, 15 N. Mex. 439, 445-449, 110 Pac. 567 (1910).

source, and which was treated in the case as percolating water. The water formed a small basin on the tract of land on which it came to the surface, sometimes receding and sometimes spreading to an adjoining tract on which it was put to use by the owner with the consent of the owner of the land on which the water rose. A third party attempted to appropriate the water, by a ditch through the land of the party on which the water arose, pursuant to the State statutory appropriation procedure. The supreme court held that the only seepage water subject to appropriation under permit from the Territorial Engineer was seepage water from constructed works, which did not apply to this present situation. With respect to rights to the use of percolating water, in small quantity from a source unknown, the court said (at 15 N. Mex. 446) that: "It must be conceded, that for many years, the law as to such waters has been that the water was a part of the land and that each land owner could do with it as he chose."

The court in VANDERWORK v. HEWES and DEAN differentiated the situation before it from that to which the doctrine of reasonable use, as defined in the California case of KATZ v. WALKINSHAW, 211/ should apply. That is, the California case involved rights to the use of percolating water from large areas of land saturated with artesian water. Also, in the instant case, the water while on the land on which it rose, and on the adjoining land on which it was being used, was not subject to appropriation by anyone without the consent of those landowners, so as to deprive them of the use of the water on their land. The rights of the adjoining landowner were subject to the prior right of the owner of the land on which the water rose to apply all of the water to a beneficial use on his own lands. The court suggested that any surplus above such beneficial use could be appropriated by the adjoining landowner, and that any surplus after the use of both such landowners was subject to appropriation in accordance with the general western law of prior appropriation. 212/

The court decisions rendered prior to the enactment of the ground-water appropriation statute, therefore, indicated (1) that the rules governing rights to underground streams and those relating to percolating waters were not the same, and (2) that diffused percolating waters were subject to the beneficial use of the landowner. In fact, the decision in VANDERWORK v. HEWES and DEAN apparently leans toward the strict English or common-law rule of absolute ownership for small flows from unknown sources, although it indicates a question in the mind of the court as to whether a surplus over the landowner's needs might be subject to nonstatutory appropriation by an outside party.

The law of ground waters in both legislative and judicial fields has developed greatly since the decision in VANDERWORK v. HEWES and

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211/ Katz v. Walkinshaw, 141 Calif. 116, 70 Pac. 663 (1902), 74 Pac. 766 (1903).

212/ The supreme court stated later, in Yeo v. Tweedy, 34 N. Mex. 611, 624, 286 Pac. 970 (1929, 1930), that in the Vanderwork case the court had left open the question as to whether the water there involved, seeping from an unknown source, was subject to appropriation at all.

DEAN. In the DORITY case, decided in 1950 (see "The DORITY case," p. 49-51), the court concluded that the waters therein involved had been reserved to the State as trustee for the public on or before the date of the Desert Land Act, and observed that the land patents of defendants gave them no right to water other than that actually applied in reclaiming land under the Desert Land Act. All other water, said the court, belonged to the State as trustee for the public. This last statement is partly dictum, inasmuch as the only waters involved in the DORITY case were those of an artesian basin and the overlying shallow ground waters, but it may well reflect the current trend of thought.

Appropriability of Artesian Waters

Effect of Act of 1927

The New Mexico legislature in 1927 enacted a statute relating to the appropriation and control of certain ground waters, the first section of which provided that: 213/

> All waters in this State found in underground streams, channels, artesian basins, reservoirs, or lakes, the boundaries of which may be reasonably ascertained by scientific investigations or surface indications, are hereby declared to be public waters and to belong to the public, and subject to appropriation for beneficial uses under the existing laws of this State relating to appropriation and beneficial use of waters from surface streams.

The decision in YEO v. TWEEDY 214/ held the 1927 act void on technical grounds, but it laid the basis for the passage of an act free from the objectionable features.

Appropriability in Absence of Statute

The supreme court stated in YEO v. TWEEDY that the doctrine of appropriation, which had long since been adopted in New Mexico with reference to surface waters, was best adapted to the condition and circumstances of the State; and the logical consequence was that the same doctrine should be applied to definite bodies

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213/ N. Mex. Laws 1927, ch. 182. It will be noted that the first section of the statute as reenacted in 1931 follows closely the language of this 1927 declaration of public, appropriable ground waters, the only important changes being the elimination of the ascertainment of boundaries "by scientific investigations or surface indications," and of the reference to existing laws relating to appropriations from surface streams.

214/ Yeo v. Tweedy, 34 N. Mex. 611, 615-617, 619-621, 286 Pac. 970 (1929, 1930). The ground on which the 1927 act was held void, at 34 N. Mex. 627-629, was that the extension of provisions of existing law was in contravention of a provision of the State constitution to the effect that no law should be revised or amended or the provisions thereof extended by reference to its title only, but that each section thereof as revised, amended, or extended should be set out in full. It was therefore held that the extension within the 1927 statute, being prohibited by the constitution and not being within any exception to that prohibition, could not be sustained.

of artesian waters. As to the superiority of the appropriation doctrine over the doctrine of correlative rights with respect to ground waters in artesian basins, reservoirs, or lakes, the boundaries of which may be reasonably ascertained, it was stated (at 34 N. Mex. 620) that:

> Such bodies of subterranean water are the principal resource of the localities where they occur. Their employment to the best economic advantage is important to the state. According to the "correlative rights" doctrine, each overlying owner would have the same right--the right to use whenever he saw fit. The right does not arise from an appropriation to beneficial use, which develops the resources of the state. It is not lost or impaired by nonuse. Regardless of the improvements and investments of the pioneers, later comers or later developers may claim their rights. The exercise of those rights which have been in abeyance will frequently destroy or impair existing improvements, and may so reduce the rights of all that none are longer of practical value, and that the whole district is reduced to a condition of non-productiveness. The preventive for such unfortunate and uneconomic results is found in the recognition of the superior rights of prior appropriators. Invested capital and improvements are thus protected. New appropriations may thus be made only from a supply not already in beneficial use. Nonuse involves forfeiture. A great natural public resource is thus both utilized and conserved.

The court concluded (at 34 N. Mex. 624) that "the waters of an artesian basin whose boundaries have been ascertained are subject to appropriation." It was further concluded that the 1927 law, while objectionable in form, was declaratory of existing law, and was fundamentally sound. 215/

The supreme court decided in YEO v. TWEEDY, therefore, that the ground-water statute of 1927 was declaratory of existing law and was fundamentally sound, but was technically void; and that the waters of an artesian basin the boundaries of which had been ascertained were subject to appropriation even without the aid of the statute.

215/ There was one dissenting opinion, in which it was considered that the English common-law rule, as modified, was the law in New Mexico prior to passage of the 1927 act, and that therefore legislation could not take away the vested right of the owner of overlying land to abstract percolating water without license from the State.

Effect of Act of 1931

The legislature, at the session in 1931 following the decision in YEO v. TWEEDY, passed a new act with the features which the court held objectionable eliminated. With certain amendments and additions, this statute is in operation. 216/ This has been discussed under "Extant legislation," p. 47-51.

A decision rendered in the year in which the present statute was enacted concerned chiefly a question of jurisdiction. 217/ It was held that a statutory suit to adjudicate water rights of a stream system is all-embracing and includes claims of appropriations from an artesian basin within such system; and that the jurisdiction of the court in which the adjudication suit is pending is exclusive of the jurisdiction of another district court to entertain a suit by artesian-water appropriators attacking the right of a stream appropriator asserted in the pending adjudication. The new 1931 law was referred to, but its validity was not in issue.

A later case that was heard by the supreme court on two appeals involved questions of administrative control of artesian waters. The court on the first appeal referred to the "sound reasoning" of the holding in YEO v. TWEEDY that legislative enactments classifying the waters of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably ascertainable boundaries, as public and subject to appropriation, are merely declaratory of the state of the law prior to such legislation, and that such waters, except for physical differences, are affected with all the incidents of surface waters as to use, appropriation, and administration. 218/ Defendant's well was drilled outside the defined boundaries of an artesian basin, and without a permit. The court stated (at 50 N. Mex. 189) that:

> It may be granted, as already conceded, that no permit is necessary for drilling in such territory. But it does not follow that, where such well taps waters of an artesian basin or other underground stream whose available supply of waters already has been exhausted by prior appropriation, the well owner acquires a valid right to the use of such waters as against the body of prior appropriators. * * *

The court concluded that the plaintiff artesian conservancy district had the right to maintain a suit to enjoin the use of water from defendant's artesian well which tapped the waters of the artesian basin supplying the lands embraced within the district, even though the well was drilled on land outside of the territorially defined boundaries of the basin as well as outside the boundaries of the district.

216/ N. Mex. Stats. 1953, Ann., secs. 75-11-1 to 75-11-12.
217/ El Paso & R. I. Ry. v. District Court, 36 N. Mex. 94, 99-100, 8 Pac. (2d) 1064 (1931, 1932).
218/ Pecos Valley Artesian Conservancy Dist. v. Peters, 50 N. Mex. 165, 182, 189, 190, 173 Pac. (2d) 490 (1945, 1946).

On the second appeal in the foregoing case, the supreme court followed the rule that in contests over water rights, prior appropriators who complain of injury must prove that their use of water is reasonable and beneficial, and that the new appropriator then must show the surplus from which water may be taken without injuring prior rights. 219/

In a proceeding by the State of New Mexico to enjoin the misapplication of ground waters, the supreme court sustained the trial court in enjoining the defendant from misapplying the waters. 220/

The constitutionality of the 1931 statute was sustained in 1950, on all points considered in STATE ex rel. BLISS v. DORITY. 221/ This has been discussed above.

Appropriability of Shallow Ground Waters

The application of the 1931 ground-water statute to shallow ground-water areas had been open to some question prior to the decision in STATE ex rel. BLISS v. DORITY, but was decided in that case with respect to the overlying valley fill in the Roswell Artesian Basin. 222/ The waters in litigation consisted of an artesian basin lying between confining strata, the waters of which were commonly referred to as artesian water; and an underground reservoir or lake in the valley fill overlying such artesian basin, the waters of which were commonly referred to as shallow ground water. About 45,000 acres were irrigated from shallow ground water and 55,000 acres from artesian water in the area. The lands of the defendants were located within the external boundaries of both ground-water sources. Defendants contended that the statute had no application to shallow ground water. The court stated (at 55 N. Mex. 30-31) that:

> It is said that the valley fill is not a reservoir or lake, and therefore is not within Sec. 1 of the Act; that "no one ever heard of a lake or reservoir with a sloping water table." One definition of a reservoir is "A place where water is collected and kept for use when wanted." (Webster). Whether the water table "slopes" we need not determine. We will assume that the law of gravitation will take care of that. We know that the valley fill is a reservoir from which billions of gallons of water are pumped to irrigate annually 45,000 acres of land, so it must be collected there; and the legislature aptly called such containers of water, reservoirs or lakes. * * *

219/ Pecos Valley Artesian Conservancy Dist. v. Peters, 52 N. Mex. 148, 152, 154, 159, 193 Pac. (2d) 418 (1948). The court stated that the district must have proved first the quantity of water legally appropriated by its water users and the quantity within their appropriations now necessary for their reasonable use; and that having introduced substantial evidence to prove those facts, the burden of proof then would shift to the well owner to establish that there was surplus water which he might beneficially use. No attempt had been made by the district to make such proof.

220/ State ex rel. Bliss v. Casarez, 52 N. Mex. 406, 407-409, 200 Pac. (2d) 369 (1948).

221/ State ex rel. Bliss v. Dority, 55 N. Mex. 12, 225 Pac. (2d) 1007 (1950).

222/ 55 N. Mex. at 15, 30-31.

The court included the waters of the valley fill, as well as the artesian basin, in its assumption that many thousands of acres of land to be irrigated therefrom had been sold to purchasers who relied on the decision in YEO v. TWEEDY, and in holding that that decision had become a rule of property that now would not be disturbed.

REGULATION OF WELL DRILLING

Sections providing for the regulation of the drilling of wells for water from an underground stream, channel, artesian basin, reservoir, or lake, the boundaries of which had been determined and proclaimed by the State Engineer, were added to the ground-water statute in 1949. 223/ The statute makes it unlawful to drill or to begin the drilling of such a well without a license issued by the State Engineer. The act contains prohibitions against the permitting by a landowner of the drilling of such a well on his land except by a licensed driller; against the production of water through a well drilled in violation of the act; and against the application of water from such underground source to land having no valid water right for the purpose to which the water is applied. The State Engineer is authorized to apply for and obtain injunction to restrain such unlawful acts.

REGULATION OF ARTESIAN WELLS

Present Statutes

Enforcement

All artesian waters that have been declared to be public waters are placed under the supervision and control of the State Engineer; but where artesian conservancy districts have been organized, such districts have concurrent power and authority with the State Engineer to enforce such regulation so far as the waters to be conserved and controlled by such districts are affected. 224/ It is specifically provided that the regulatory act is not to be construed to affect the provisions of the statute relating to the appropriation of ground waters. 225/ An artesian well for the purpose of the act is defined as "an artificial well which derives its water supply from any artesian stratum or basin." Waste is defined for the purposes of the act. 226/

223/ N. Mex. Laws 1949, ch. 178; Stats. 1953, Ann., secs. 75-11-13 to 75-11-18.
224/ N. Mex. Stats. 1953, Ann., secs. 75-12-1 to 75-12-12.
225/ N. Mex. Stats. 1953, Ann., secs. 75-11-1 to 75-11-12.
226/ N. Mex. Stats. 1953, Ann., sec. 75-12-6. Waste is the causing or permitting of any artesian water to reach any pervious stratum above the artesian strata before coming to the surface, or causing or permitting any artesian well to discharge unnecessarily upon the surface, unless the waters are to be placed to beneficial use through a constructed irrigation system. The use of such water for ornamental ponds or fountains is exempted.

Artesian Conservancy Districts

A statute provides for the organization of artesian conservancy districts for the purpose of conserving the waters in artesian basins, the boundaries of which have been scientifically determined by investigations, and where such waters have been beneficially appropriated. 227/ A district may include all lands overlying any such artesian basin and any lands outside the boundaries of the basin upon which waters therefrom are being used under appropriations; and two or more closely related artesian basins or reservoirs may be included in the same district.

An artesian conservancy district is authorized to maintain a suit to enjoin the use of water taken from an artesian well drilled on land outside the boundaries of the district, but alleged to be supplied by the artesian basin underlying the lands within the boundaries of the district, to the detriment of the water users of the district. 228/ In the maintenance of such a suit, the district must first prove the quantity of water legally appropriated by its water users and now necessary for their reasonable use. 229/ If that is done, the defendant has the burden of proving that there is surplus water which he may beneficially use.

Exercise of Police Power

A statute enacted in 1909 230/ (superseded by the present act) provided for the repair, by the well supervisor, of artesian wells which were wasting water, the cost of repair to become a lien on the land. The validity of this act was sustained by the supreme court as a valid exercise of the police power of the State, not violative of either the Federal or the State constitution. 231/ The ownership of the water was not in issue in the case, or discussed by the supreme court. The detriment to the public of wasting water and contributing to the waterlogging of lands was the justification for the legislation regulating artesian wells.

227/ N. Mex. Stats. 1953, Ann., secs. 75-13-1 to 75-13-24.

228/ Pecos Valley Artesian Conservancy Dist. v. Peters, 50 N. Mex. 165, 168, 190, 173 Pac. (2d) 490 (1945, 1946).

229/ Pecos Valley Artesian Conservancy Dist. v. Peters, 52 N. Mex. 148, 154, 193 Pac. (2d) 418 (1948).

230/ N. Mex. Laws 1909, p. 177.

231/ Eccles v. Ditto, 23 N. Mex. 235, 240-249, 167 Pac. 726 (1917). The court held in Eccles v. Will, 23 N. Mex. 623, 625-626, 170 Pac. 748 (1918), that a lien for the repair of a well did not take precedence over a prior recorded mortgage, the statute being silent on the matter.

CASES CITED

NEW MEXICO SUPREME COURT

OTHER STATES

FEDERAL

UNITED STATES SUPREME COURT